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In the Supreme Court of the United States

October Term, 1994

DAN E. MOLDEA,
Petitioner,

v.

THE NEW YORK TIMES COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For the District of Columbia Circuit

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QUESTIONS PRESENTED

1. Whether the First Amendment requires application of the "broader context" factor when challenged statements appear in certain formats or genres, such as book reviews, thereby permitting a finding that the statements, which are otherwise verifiable under Milkovich, are nonactionable based solely upon the effect of that factor?

2. Whether the First Amendment requires application of the "supportable interpretation" standard whenever defamatory statements appear in certain formats or genres, such as book reviews, regardless of whether the book in question is an ambiguous source?

3. Whether the First Amendment requires application of different procedural principles in deciding the issues of verifiability and falsity on a motion for summary judgment brought by a media defendant, whereby the non-moving libel plaintiff is deprived of the benefit of all favorable inferences and the favorable weighing of the evidence, which benefits this Court in Liberty Lobby and Masson held were required in deciding the issue of malice?

PARTIES TO THE PROCEEDINGS

Petitioner is Dan E. Moldea, an investigative reporter who authors books about organized crime's association with and infiltration of legitimate American business.

Respondent is the New York Times Company, publisher of the New York Times Book Review, which is acknowledged to be the most influential book review in the country.

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Petitioner, Dan E. Moldea ("Moldea"), respectfully prays that a writ of certiorari issue to review the opinion and judgment entered and filed by the United States Court of Appeals for the District of Columbia Circuit in the above-titled proceeding on May 3, 1994.

OPINIONS BELOW

The January 31, 1992 Memorandum and February 6, 1992 Order of the United States District Court for the District of Columbia granting The New York Times Company's ("The Times") motion for summary judgment are reported at 793 F.Supp. 335 (D.D.C. 1992), and appear in Appendix A hereto. The February 18, 1994 Opinion of the United States Court of Appeals for the District of Columbia Circuit reversing the District Court's decision is reported at 15 F.3d 1137 (D.C.Cir. 1994), and appears in

Appendix B hereto ("Moldea I"). The May 3, 1994 Opinion of the United States Court of Appeals for the District of Columbia Circuit reversing its decision in Moldea I is reported at 22 F.3d 310 (D.C.Cir. 1994), and appears in Appendix C hereto ("Moldea II").

JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit entered judgment in favor of The New York Times on May 3, 1994.[1] This Petition for Certiorari is filed within ninety (90) days of that date, and is thus timely. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

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[1]A copy of the Judgment appears in Appendix D hereto.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

STATEMENT OF THE CASE

This case is manifestly one of the most, if not the most, closely watched libel cases in recent history. It arises from a factually inaccurate and defamatory book review ("Review") published by the Respondent, The Times, on September 3, 1989, about Interference: How Organized Crime Influences Professional Football ("Interference").[2]

Interference was written by Petitioner, Moldea, an investigative journalist, who

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[2]A copy of the Review appears in Appendix B at 26-28 hereto. Copies of Interference were submitted as a Lodging herewith.

had long distinguished himself as a leading expert and respected author on organized crime's association with, and infiltration of legitimate American businesses.

The Times' Book Review is commonly recognized as the most influential book review in the country. As such, it exerts a powerful influence over the publishing industry and the reading public, and frequently has a major and direct impact on the success or failure of any book (and author) which it reviews.

The Times publicly touts and advertises the accuracy of its reporting activities, and has publicly represented that it will promptly correct any factual error. The Times also represents to the reading public that it does not knowingly assign book reviews to anyone who has had close ties with any person or organization prominently mentioned in the book under consideration.

Using these techniques, The Times has successfully cultivated a reputation for publishing fair and objective book reviews, which is one of the primary reasons why The Times Book Review is so influential. Its market power directly affects the purchasing decisions of consumers, as well as major retail book stores and chains.

On the basis of Moldea's own hard-earned and well-deserved professional reputation, he secured a book contract from William Morrow & Co. ("Morrow"), a New York publisher, to write about gambling and organized crime's infiltration of the National Football League ("NFL").

After Moldea drafted the Interference manuscript, he forwarded it to a number of experts on the NFL, gambling and organized crime for their consideration and comment, in part, to ensure that the book was fair and accurate in its treatment of its

subject. Moldea also offered to provide a copy of the Interference manuscript to the NFL's Director of Security.

In reliance upon the Times' published correction and conflict policies, Moldea authorized Morrow to send a pre-publication courtesy copy of Interference to The Times. Using this advance copy, the Times published the Review a week before the 1989 NFL regular season began. However, departing from its publicized policy against assigning books to reviewers with conflicts of interest, The Times selected as its reviewer, Gerald Eskenazi ("Eskenazi"), a Times' sportswriter/employee who had been primarily responsible for covering the NFL since 1959 and then published a misleading credit line suggesting that Eskenazi was a sportswriter who covered baseball.

Eskenazi (as well as his employer, The Times) had long been dependent upon the

goodwill of NFL sources for information necessary to report on the League's activities.[3] Eskenazi was far more concerned with protecting his friends and sources in the NFL, than he was to giving Interference a fair and objective review.

Prior to the date the Review was published, Interference was selling briskly with the onset of the 1989 NFL season. Petitioner was engaged in a thirteen-city, seventy interview, promotional tour after the book was released, which included numerous national media interviews. Interference and Moldea's tour generated robust debate over the evidence of

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[3]Eskenazi's personal notes (which were obtained by Moldea in the brief period before discovery was stayed) strongly suggest that he solicited the input of the NFL's Director of Communications, Joe Browne (a long-time source for Eskenazi who was acknowledged for his cooperation by Eskenazi in a 1976 book about the NFL), before writing the Review.

organized crime's connections with the NFL which Moldea had unearthed and published for the first time in Interference. The tour generated such favorable publicity that Morrow ordered second and third printings in addition to the 28,000 copy initial printing. Sales were moving briskly and promised to get better with the onset of the 1989 NFL season. Then the Review was published.

The Review included the broad assertion that Interference had "too much sloppy journalism to trust the bulk of this book's 512 pages . . . ." App. B at 26-7. It described the book's depiction of a meeting between the Jets' Joe Namath and the Colts' Lou Michaels as "sinister," and stated that "the truth" was something else. App. B at 27. In fact, the book stated that the meeting "was accidental and confrontational" and "'nothing technical' about the

game was discussed." Interference at 197. Similarly, the Review represented that Moldea "revive[d] the discredited notion that Carroll Rosenbloom . . . met foul play when he drowned in Florida 10 years ago." App. B at 27. But Interference stated that "[i]n short, the evidence appears to be clear that Rosenbloom died in a tragic accident and was not murdered." Interference at 360 (emphasis supplied).

The Review falsely accused Moldea of omitting critical information from the "text" of his description of the 1958 NFL Championship game, i.e., the fact that the Colts' kicker "was among the worst place-kickers in the league ...." App. B at 28. But in an endnote in Interference, Moldea explained that Baltimore had the second worst field goal percentage in the NFL, buttressing his discussion in the text about the Colts' decision not to send their

kicker into the game. Interference at 90; 444 n.1. Among other false assertions, the Review claimed that Moldea failed to disclose to the readers of Interference that Joe Hirsch worked for The Morning Telegraph when, in fact, the book provided that precise information. App. B at 27; Interference at 139.

The impact of the Review was swift and devastating both to Interference and Moldea. It utterly destroyed Moldea's reputation as an investigative journalist, with the result that Moldea could no longer earn a living as a writer. There was also no further media attention to the substance of the book.

Immediately after the Review was published, Moldea wrote to Eskenazi and The Times to complain about Eskenazi's manifest conflict of interest, the numerous false and defamatory statements contained in the

Review, and to request a retraction. However, despite the existence of advertised policies against assigning books to reviewers with conflicts of interest, and to promptly correct any factual mistakes, The Times refused to take any action.

Subsequently, The Times even refused to publish Moldea's letter to the editor, a courtesy it typically afforded authors whose books received inaccurate or unfavorable reviews.

In order to restore his reputation and the integrity of his book, Moldea (a long-time writers' rights activist) reluctantly initiated this lawsuit.

THE PROCEEDINGS

1. The District Court's Decision

Petitioner filed his Complaint in the United States District Court for the District of Columbia on August 23, 1990.

It included causes of action for defamation and false light invasion of privacy. Shortly after filing its Answer, The Times moved for summary judgment, and requested a stay of discovery, which stay was granted over Petitioner's objection. In this regard, the district court was swayed by assurances in The Times' motion for summary judgment that it did not contest the issue of malice, but based its challenge solely on the words contained in Interference and in the Review.

In opposing The Times' summary judgment motion, Petitioner argued that each of the statements cited in his Complaint was either a false statement of fact, or implied a false statement of fact, and that each such statement was independently actionable. However, the district court granted The Times' motion for summary judgment, determining that the allegedly

defamatory statements contained in the Review were either non-verifiable opinions or supported statements of fact, and thus not actionable under libel law. App. A at 9-10 n.3, 11.[4]

2. Moldea I

In a 2-1 decision, after extensive briefing and full argument, the court of appeals, per Judge Edwards, reversed the district court's summary judgment in Moldea I. In so doing, the court initially determined that the Review was clearly capable of a defamatory meaning. App. B at 9. ("[T]he District Court . . . did not reach the question of whether The Times review was capable of a defamatory meaning.

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[4]The Court further held that The Times was entitled to judgment on Petitioner's false light claim because it was not based on the publication of private facts. App. A at 12-13. Finally, the Court denied Petitioner's July 12, 1991 motion for leave to amend his Complaint.

We find, however, that the review clearly is capable of a meaning that would tend to injure Moldea in his chosen profession, investigative journalism -- indeed, Moldea alleges that the review did precisely that, and with devastating effect.")

The Court then addressed the issue of "whether the challenged statements . . . [were] verifiable, and if so, whether a reasonable juror could find them to be false." App. B at 9. In this regard, both the majority and the dissenting opinions observed that this Court's decision in Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990), "implicitly rejected [Ollman v. Evans, 750 F.2d 970 (D.C.Cir. 1984)(en banc), cert. denied, 471 U.S. 1127 (1985)] 'totality of the circumstances' test in favor of a single inquiry into whether the alleged defamatory statement is verifiable." App. B at D-4. (Mikva, C.J.,

dissenting). See Milkovich, 497 U.S. at 19 ("[respondents] propose that a number of factors developed by the lower courts (in what we hold was a mistaken reliance on the Gertz dictum) be considered in deciding which is [opinion or fact]") (emphasis added). However, the Moldea I majority and dissent parted company on the continued vitality of the third and fourth factors, i.e., the "general context" and the "broader context" factors, which this Court had observed in Milkovich had been used by the Supreme Court of Ohio in the closely-related Scott v. News-Herald, 496 N.E.2d 699 (Ohio 1986), "to trump" the preliminary finding that the challenged passages were actionable assertions of fact. Milkovich, 497 U.S. at 9.

The Moldea I majority was cognizant of the fact that this Court in Milkovich only considered "the 'general tenor' of the

article at issue" in order to determine whether the article contained loose, figurative or hyperbolic language that negated "the impression that the writer was seriously maintaining that [Milkovich] committed the crime of perjury." Milkovich, 497 U.S. at 21.

Accordingly, the Moldea I majority indicated that it would be wrong to ignore Milkovich simply because "the challenged statements appeared in a 'book review' rather than in a hard news story." App. B at 14. To the contrary, the Moldea I majority pointed to this Court's rejection of the "broader context" factor in Milkovich, where the Court gave no consideration to the fact that the challenged statements "appeared in an opinion column in a newspaper sports section, a forum well known for spirited expressions of personal

opinion." App. B at 15 (citing Milkovich, 497 U.S. at 9).

Finally, the Moldea I majority analyzed each of the challenged statements in the Review. The Moldea I majority determined that "some of the challenged characterizations of Interference [were] sufficiently factual that a jury could meaningfully determine their truth or falsity." App. B at 2. The Moldea I majority further found that "while some of the review's characterizations are irrefutably true and thus not actionable, the accuracy of other statements in the review is sufficiently open to dispute that we cannot hold as a matter of law that no reasonable juror could find them to be false." App. B at 2-3.

Accordingly, the court in Moldea I reversed the summary judgment of Petitioner's libel and false light claims,

and also remanded for further consideration a proposed amendment by Petitioner to add four causes of action based upon this Court's decision in Cohen v. Cowles Media Co., 501 U.S. 663 (1991). App. B at 4 n.3.

3. Moldea II

After Moldea I was published, a firestorm of protest arose from the media and the publishing community that the decision threatened to "undermine two centuries of jurisprudence protecting literary criticism." Petition for Rehearing with Suggestion for Rehearing En Banc of Appellee The New York Times Company at 1. Two amicus briefs were filed, which collectively accounted for virtually all of the important national publications and media organizations in this country.

On May 3, 1994, the same three judge panel of the District of Columbia Circuit reversed itself and issued Moldea II. It

adopted a totally new inconsistent legal standard, and affirmed the trial court's summary judgment in favor of The Times. Indeed, writing for a newly unanimous Court in Moldea II, Judge Edwards stated that Moldea I would remain controlling if the court continued to interpret Milkovich as it had in its initial decision and did not consider the "broader context" factor. App. C at 9. However, Judge Edwards held the Court had made a "mistake in judgment" in Moldea I by "fail[ing] to take sufficient account of the fact that the statements at issue appeared in the context of a book review, a genre in which readers expect to find spirited critiques of literary works that they understand to be the reviewer's description and assessment of texts that are capable of a number of possible rational interpretations." App. C at 3.

Moldea II opined that "Moldea I erred in assuming that Milkovich abandoned the principle of looking to the context in which speech appears." App. C at 9. To the contrary, Moldea II held, "Milkovich did not disavow the importance of context, but simply 'discounted it in the circumstances of that case.'" App. C at 7 (quoting Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724, 729 n.9 (1st Cir.), cert. denied, ___ U.S. ___, 112 S.Ct. 2942 (1992).

In order to give greater "breathing space" to certain genres, like book reviews, a degree of protection Milkovich's reasonable jury test did not afford, Moldea II not only returned to the four-factor Ollman test, but held that it was necessary to employ a "supportable interpretation" test based in large part on this Court's decision in Masson v. New Yorker Magazine,

Inc., ___ U.S. ___, 111 S.Ct. 2419 (1991). App. C at 10-13. Under this new standard, "when a reviewer offers commentary that is tied to the work being reviewed, and . . . is a supportable interpretation of the author's work, that interpretation does not present a verifiable issue of fact that can be actionable in defamation." App. C at 6.

The Moldea II court held that Milkovich was factually distinguishable and thus not controlling, reasoning that because the challenged statement in Milkovich contained an accusation of criminal conduct, this Court in Milkovich did not have to address "the effect that the column's context may have had on those who read it." App. C at 7. Applying the "supportable interpretation" test, the court in Moldea II concluded that only one of the challenged statements of fact was verifiably false, but that this one defamatory statement,

even if Petitioner could prove it was written with malicious intent, was not sufficient to create a triable claim, because on the whole, the Review was substantially true. App. C at 16-18. Accordingly, the court reversed its prior opinion and affirmed the district court. App. C at 20.

4. The Moldea Case Has Been Closely Followed By The National Press

There is no question that the outcome of this case will have a nationwide impact on libel law. The media's coverage of the Moldea case has been extraordinary in both its substance and volume.[5] In commenting on the place of the case in First Amendment

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[5]There have been well over 100 articles in the major print media on Moldea since the initiation of the case, including 13 articles in the Washington Post, nine articles in Editor & Publisher, six articles in the Los Angeles Times, four articles in the New York Times and three articles in the Wall Street Journal.

jurisprudence, one columnist noted, "In 1964, there was the New York Times v. Sullivan . . . . In 1971, there was New York Times v. United States . . . . Now there's Moldea v. New York Times." Lee Levine, Diving Catch, AMERICAN JOURNALISM REVIEW, July-Aug. 1994, at 35, 36. "Moldea v. New York Times' [has been described] as one of the most important libel cases facing the publishing industry," THR E-Mail: Sloppy Journalism, THE HOLLYWOOD REPORTER, April 25, 1994; and Moldea "raises questions at the heart of any critic's professional life." David L. Ulin, Sign of the Times?, LOS ANGELES READER, May 27, 1994, at 26.

Significantly, virtually every major media organization in the country joined in an amicus curiae brief submitted in the Moldea case to the Court of Appeals for the District of Columbia Circuit in which those

organizations characterized the Moldea case as a "manifestly important, [and] highly noted case." Brief Amicus Curiae on Behalf of the Newspaper Association of America, et al. in Support of Appellee's Petition for Rehearing and Suggestion for Rehearing En Banc at 15.

The Wall Street Journal described the Moldea case as a "closely watched libel case," Paul M. Barrett, Author's Libel Suit Over Harsh Review Is Allowed to Proceed by Appeals Court, WALL ST. J., February 22, 1994, at B6. Similarly, the Los Angeles Times described it as "another literary lawsuit destined eventually to reach the Supreme Court." A 'Pretty' Parody Stands Up, LOS ANGELES TIMES, March 9, 1994. Carlin Romano, president of the National Book Critics Circle, recently weighed in on the significance of the Moldea case, stating, in the first of a lengthy two-part

series for The Nation, that "Moldea v. The New York Times is the most provocative First Amendment case in years . . . . It pits deeply entrenched legal ideals against each other: the 'breathing space' that criticism needs to be effective, and the right of an individual to defend his reputation." Carlin Romano, Paper Chase-I, THE NATION, June 6, 1994, at 778, 780.

Former Solicitor General Kenneth Starr, who was the author of the Ollman opinion when he was on the D.C. Court of Appeals, filed an amicus brief in favor of reversing Moldea I. Mr. Starr publicly acknowledged on Court TV that the Moldea case was one of "monumental" importance. Court TV, May 6, 1994.

REASONS FOR GRANTING THE WRIT

I. This Court Should Resolve The Split Of Authority That Exists Concerning Whether The Broader Context Or Genre In Which Challenged Statements Appear Continues To Bear On The Issue Of Verifiability After Milkovich

Prior to this Court's decision in Milkovich, "most courts recognized a strict dichotomy in defamation actions between assertions of opinion and assertions of fact," with the former category of statements "thought to be protected by the First Amendment." App. B at 9. The evolution of this practice was commonly traced to the famous dictum contained in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), wherein this Court stated:

> [u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.

Id. at 339-40.

The four-factor Ollman test which arose in mistaken reliance on the Gertz dictum gradually allowed courts to "trump" otherwise verifiable false statements and transmogrify them into protectable opinion. Milkovich, 497 U.S. at 9. In his dissenting opinion in the Scott v. News-Herald, 496 N.E.2d 699 (1990), a case which was precedent for the related state court Milkovich opinion, Judge Brown warned of the dangers inherent in the Ollman test. He bluntly condemned Ollman's four-factor test as follows:

> . . . [the Ollman four-factor test] is, in practice, so malleable and spongy as to permit any interpretation anyone wishes. It will enable any judge or reviewing court to label any clearly libelous statement of fact as a statement of opinion and thereby for all practical purposes create absolute immunity for every congenital liar who publicly utters or writes slanderous or libelous statements.

* * * * *

> All of the foregoing is apparent from the majority's vapid, meaningless, so-called four-factor test to determine if a defamatory statement is a statement of fact or opinion. Where this issue exists in any libel trial in future cases involving the press as a defendant, the trial judge might as well simply direct a verdict for the defendant, or even better, routinely grant summary judgment motions made by the defense, because, given the result of the case at bar, it is difficult to imagine what otherwise libelous statements of fact will remain actionable once they have been printed in a newspaper.
>
> The standardless four-factor test for distinguishing fact from opinion, as applied here in Scott, makes every statement of fact a statement of opinion in every case and therefore not actionable. This is a deprivation of every libeled plaintiff's rights under both the Ohio Constitution and the United States Constitution.

Id. at 723, 725.

In 1990, this Court responded in Milkovich. It squarely rejected the notion that Gertz was "intended to create a wholesale defamation exemption for anything that might be labeled 'opinion.'" Milkovich,

497 U.S. at 18. This Court deemed such "an additional separate constitutional privilege for 'opinion'" unnecessary because existing safeguards already "ensure[d] the freedom of expression guaranteed by the First Amendment." Id. at 21. In so doing, this Court refused to adopt or employ the four-factor analysis annunciated by the Court of Appeals for the District of Columbia Circuit in Ollman.

Instead, Milkovich focused on three factors: 1) whether the statements were "sufficiently factual to be susceptible of being proved true or false"; 2) whether the statements were couched in "the sort of loose, figurative or hyperbolic language which would negate the impression that the writer was seriously maintaining [that Milkovich] committed the crime of perjury"; and 3) whether the "general tenor of the article negate[d] this impression." Id. at

21-22. Significantly, however, this Court attributed no weight to the fourth Ollman factor, "the broader context [or genre] in which [Diadun's] . . . statement[s] appeared," i.e., the "sports page-- 'a traditional haven for cajoling, invective, and hyperbole,'" a fact the lower court deemed controlling.

This Petition should be granted because the federal circuits and the highest state courts are sharply divided on the issue of whether this Court intended to overrule the Ollman test in Milkovich so that all allegedly libelous statements are treated the same, regardless of the broader context or genre in which they appear.

Some courts after and in light of Milkovich have rejected the four-factor Ollman approach and now have refused to give weight to the "broader context" factor. E.g., Unelko Corp. v. Rooney, 912

F.2d 1049, 1053-54 (9th Cir. 1990), cert. denied, 499 U.S. 961 (1991); Kolegas v. Heftel Broadcasting Corp., 607 N.E.2d 201, 208 (Ill. 1992).

By clear contrast, there are several federal circuit and state court opinions which expressly hold that Milkovich does not preclude their use of the Ollman four-factor test, and continue to give weight to the "broader context" factor. E.g., Lapkoff v. Wilks, 969 F.2d 78, 82 (4th Cir. 1992) ("In determining whether a statement expresses an actual fact about an individual such that the comment is actionable or whether the comment is a nonactionable opinion the Court may consider . . . the broader social circumstances in which the statement was made [citing to a pre-Milkovich Fourth Circuit case which based its four factor test on Ollman]); Phantom Touring, Inc.,

953 F.2d at 727, 729 n.9 ("Milkovich did not depart from the multi-factored analysis that had been employed for some time by lower courts seeking to distinguish between actionable fact and nonactionable opinion. [citing Ollman and totality of circumstances test] . . . Although the Court in Milkovich gave no significance to the fact that the challenged article was a sports column, we do not understand the Court to have rejected the relevance of format, but simply to have discounted it in the circumstances of that case."); NBC Subsidiary, Inc. v. Living Will Ctr., (1994 Colo. LEXIS 527 at 13-14) (7/11/94) (relying on Moldea II in support of holding that broader context factor is relevant). In sum, a

> review of the case law since Milkovich bears out the contention . . . that Milkovich changed nothing . . . . [L]ower courts have . . . resurrect[ed] their old opinion tests. Some have been subtle, purporting to follow

> Milkovich's new dictates. Others have been blunt, expressly following their old tests despite Milkovich's language. The result is that lower courts are once again trapped in a theoretical quagmire, with courts reaching different results on similar fact patterns.

Note: "Milkovich v. Lorain Journal Co.: The Supreme Court's Failed Attempt To Eliminate The Opinion Defense In Libel Law," The Review of Litigation, 569, 570, 598 (1992).

Read together, Moldea I and Moldea II present the same nationwide conflict in microcosm. In Moldea I, Judge Edwards rejected the idea that "reviews as a genre" were entitled to a "doctrinal exemption." App. B at 15. To the contrary, Moldea I stated:

> our analysis of this case is not altered by the fact that the challenged statements appeared in a "book review" rather than in a hard news story. To permit a defendant to escape liability for libel merely because defamatory remarks are published in a book review

> would be as simplistic as permitting an author to insulate himself or herself by merely prefacing assertions with the words "I think..." and calling everything that followed nonactionable opinion. In other words, it would make little sense to craft a rule that permitted otherwise libelous statements to go unchecked so long as they appeared in certain sacrosanct genres.

App. B at 14, and further held that "assertions that would otherwise be actionable in defamation are not transmogrified into nonactionable statements when they appear in the context of a book review." App. B at 15 (citing the fact that the forum in Milkovich "played no part in [this] Court's analysis").

Moldea II was a complete about face on the same exact set of facts by the same panel of judges. While conceding that "Milkovich could be interpreted as we read it in our initial decision," Moldea II held that "we are unwilling to assume that the

Court meant to sweep away so much settled law [i.e., concerning the importance of broader context or genre] without a clearer indication that this was indeed its intent." App. C at 9 (emphasis supplied). Finding that book reviews are "a genre in which readers expect to find spirited critiques of literary works that they understand to be the reviewer's description and assessment that are capable of a number of possible rational interpretations," App. C at 3, Moldea II created the "supportable interpretation" standard, rather than employ Milkovich's reasonable jury verifiability test.

The Court of Appeal's reversal of its earlier decision based on which interpretation of Milkovich is proper, and Judge Edwards' plaintive cry for "a clearer indication . . . of intent" in Moldea II bears further testament to the need for

this Court's review to resolve the existing circuit and state court conflict. The reduction in clarity resulting from Moldea II's restoration of Ollman's "broader context" or genre factor runs counter to this Court's recognition that "[u]ncertainty as to the scope of the constitutional protection can only dissuade protected speech -- the more elusive the standard, the less protection it affords." Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 686 (1989).

The instant case is an ideal opportunity to resolve the ambiguity, indeed the clear conflict, between what this Court intended in Milkovich and how it is being construed in many lower courts, namely whether genre can no longer trump a finding of verifiability in the wake of Milkovich, or was merely "'discounted . . . in the

circumstances of that case.'" Phantom Touring, Inc., 953 F.2d at 729 n.9.

II. The First Amendment Does Not Permit The Use Of The Supportable Interpretation Standard Unless The Challenged Statements Are Based On A Source That Bristles With Ambiguities

Moldea I held that, based on Milkovich and without regard to the "broader context" factor, a reasonable jury could conclude that some of challenged defamatory statements in The Times' Review were verifiable and false because they mischaracterized statements contained in a non-fiction book, Interference. App. C at 14-15; App. B at 16-19. In reversing, Moldea II held that application of the verifiability test in Milkovich was inappropriate. Instead, Moldea II held that the proper test to determine the verifiability of the challenged statements was the "supportable interpretation" test which, when applied to the instant case, means "whether no

reasonable person could find that the Review's characterizations were supportable interpretations of Interference." App. C at 15 (emphasis in original). Applying this radically different standard, the Court held that The Times' Review was not actionable in defamation. Id.

In support of its adoption of this totally new standard, Moldea II relied primarily on Masson, and this Court's analysis in Masson of Time, Inc. v. Pape, 401 U.S. 279 (1971) and Bose Corp. v. Consumers Union of the U.S., Inc., 466 U.S. 485 (1984).[6]

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[6]Moldea II acknowledged that "Masson, Bose and Pape all concerned the evidence necessary to establish 'actual malice,'" but nevertheless concluded that, "[b]ecause of their focus on falsity, the reasoning of these decisions was fully applicable to the instant case. App. C at 12-13.

However, before deciding to employ the supportable interpretation standard at the threshold verifiability stage of this liti-
(continued...)

Moldea II's adoption of the "supportable interpretation" standard where book reviews are concerned is improper because it conflicts with this Court's holdings in Milkovich and Masson.

In Milkovich, this Court formulated the following verifiability test, which it applied without regard for the "broader context" or genre in which the challenged statement appeared, i.e., whether a reasonable juror could find that the statements are "sufficiently factual to be susceptible of being proved true or false." Milkovich,

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[6](...continued)
gation, Moldea II should have considered the fact that The Times conceded the issue of malice for the purpose of summary judgment, and that Moldea's status as a public or private figure had yet to be established. Further, Moldea II failed to take into account the much more demanding clear and convincing evidentiary standard which is applicable at the actual malice stage whenever a public figure sues a media defendant for libel. See Curtis Publishing Co. v. Butts, 388 U.S. 130, 162-165 (1967) (Warren, C.J., concurring in result).

497 U.S. at 21. In Moldea I, Judge Edwards dutifully applied the Milkovich test, and flatly rejected the notion that book reviews, or any other format or genre, were entitled to favored treatment:

> To permit a defendant to escape liability for libel merely because defamatory remarks are published in a book review would be as simplistic as permitting an author to insulate himself or herself by merely prefacing assertions with the words "I think . . ." and calling everything that followed nonactionable opinion. In other words, it would make little sense to craft a rule that permitted otherwise libelous statements to go unchecked so long as they appeared in certain sacrosanct genres.

App. B at 14.

Moldea II, however, rejected this Court's verifiability test in Milkovich and instead created its own:

> As the Supreme Court has recognized, writers must be given some leeway to offer "rational interpretation" of ambiguous sources. See, Masson v. New Yorker Magazine, Inc., 501 U.S. 496 ___, 111 S.Ct. 2419, 2434, 115 L.Ed.2d

> 447 (1991). Thus, when a reviewer offers commentary that is tied to the work being reviewed, and that is a supportable interpretation of the author's work, that interpretation does not present a verifiable issue of fact that can be actionable in defamation . . . .
>
> * * * * *
>
> In Ollman [cite omitted], we recognized that courts have long 'considered the influence that well-established genres (emphasis original) of writing will have on the average reader.'

App. C at 6, 9 (emphasis supplied).

Moldea II's reliance on Ollman to support its adoption of a special verifiability test for certain genres, like book reviews, conflicts with Milkovich because the supportable interpretation test primarily focuses upon the fact that the author is interpreting a work, rather than determining whether the challenged statement is sufficiently factual to be verifiable. Indeed, in view of this Court's recognition in Masson that the

"rational interpretation" standard presents almost a per se defense to a libel claim, Moldea II has essentially replaced the Gertz "opinion" privilege, which Milkovich expressly rejected, with an almost equally insurmountable "interpretation" privilege, simply by creating its new supportable interpretation verifiability test.

Masson also does not support the adoption of a supportable interpretation standard in the present context. In Masson, this Court granted certiorari to consider the Ninth Circuit's affirmation of a summary judgment for the media defendant, in part, to determine whether it was proper to analyze the challenged defamatory statements under the "rational interpretation" standard. Masson, 111 S.Ct. at 2433. Like Moldea II, the Ninth Circuit relied upon Pape and Bose as the basis to apply that standard. Id.

This Court reversed, finding that the Ninth Circuit's reliance on the "rational interpretation" standard was inappropriate. In so doing, the Court held that application of that principle in the context of that case "finds no support in general principles of defamation law or in our First Amendment jurisprudence." Id. Further, this Court held that neither Pape nor Bose were applicable because they did not "involve[] the fabrication of quotations or any analogous claim, and because many of the quotations at issue might be reasonably construed to state or imply factual assertions that are both false and defamatory ...." Masson, 111 S. Ct. at 2433 (emphasis supplied). After analyzing Pape and Bose this Court held that "protection for rational interpretation serves First Amendment principles by allowing an author the interpretative

license that is necessary when relying upon ambiguous sources." Masson, 111 S. Ct. at 2434 (emphasis supplied).

Moldea II held that Masson's rejection of the rational interpretation standard is not controlling in the instant case because the challenged statements "did not purport to quote from Interference but rather offered what was plainly the viewer's interpretation of the book." App. C at 12 n.3. (emphasis added). If widely adopted, this interpretation would trivialize Masson, limiting it to challenged statements contained in quotation marks. It thus ignores this Court's reference in Masson to analogous claims, such as those in the instant case, where Eskenazi purports to characterize and describe the

contents of Moldea's book.[7] More importantly, Moldea II's holding is directly in conflict with this Court's explicit holding in Masson that this test is justified only when the author is seeking to interpret ambiguous sources. Masson, 111 S.Ct. at 2434.

No justification is provided for Moldea II's unstated premise that books, by definition, are an ambiguous source.[8]

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[7]Although sparing in his use of quotations, Eskenazi's style is closely analogous to Malcolm's in Masson. The Review is replete with passages from the book which are presented in a manner designed to lead a reasonable reader to conclude that Moldea actually made the statements, or adhered to the positions attributed to him by Eskenazi in Interference. After he presented the contents of Moldea's book in this false light, Eskenazi drove home the point charging Moldea with incompetence and dishonesty.

[8]Moldea II seemingly stands for the proposition that book reviews are a "sacrosanct genre" that, without regard to the nature of the book in question (fiction

(continued...)

Similarly, there is no finding (nor could there be) that Interference "bristles with ambiguities." It is a non-fiction, investigative work which takes definite positions, i.e., Moldea wrote that "the evidence appears to be clear that Rosenbloom died in a tragic accident and was not murdered," and Moldea described the meeting between Lou Michaels and Joe Namath as "quite accidental and even confrontational," Interference at 197; 360, which could and should have been accurately characterized by Eskenazi in his review.

Given the absence of ambiguity as to the source of the Review's challenged statements, Masson requires that a court eschew the supportable interpretation standard. This Court recognized that the

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[8](...continued)
v. non-fiction, etc.), must be analyzed under the new standard.

rational interpretation standard grants those with the most power to destroy reputations, media defendants, a "near absolute, constitutional protection" for statements challenged under that standard, and that would "ill serve the values of the First Amendment." 111 S. Ct. at 2434.

Moldea II attempted to justify applying this standard to the powerful Times because it involved an interpretation of what the author wrote and thus Moldea II held that the instant case is more like Bose and Pape than Masson. App. C at 12 n.3. However, the court's focus in Moldea II on whether or not the statement is a quotation or an interpretation is misdirected because Masson's ultimate focus was whether the source was ambiguous, which this Court held it was in Bose and Pape and was not in Masson. 111 S. Ct. at 2433-34. Thus, the instant case is directly like Masson, and

not at all like Bose and Pape, because there is no ambiguity concerning the text of Interference.

Moldea II provides, perhaps, the most extensive analysis by any circuit court of Milkovich and Masson. Further, it is the first circuit court to apply the supportable interpretation standard to the issues of verifiability and falsity without any finding that the source of a challenged statement was ambiguous, and therefore may serve as an influential precedent. This possibility is all the more probable because the Court of Appeals for the District of Columbia Circuit has been very influential in the libel area, in part from its still followed Ollman case.

This Court should grant Moldea's petition in order to clarify when and where the supportable interpretation standard should be used on the issues of

verifiability and falsity. Should it be limited to challenged statements which are based on ambiguous sources, or should it be applied to all statements about any work, regardless of whether the work is ambiguous so long as the statements appear in certain genres. Unless certiorari is granted, Moldea II and its improper interpretation of Milkovich and Masson will serve as an influential, but improper precedent for granting media defendants' summary judgment motions in future libel cases.

III. Rule 56 Procedural Standards Are To Be Applied With Neutrality In Defamation Cases And Media Defendants Are Not Entitled To Favored Treatment

In a case involving the issue of malice, this Court in Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), held that Rule 56 motions should be decided with procedural neutrality because media defendants are not entitled to favored

treatment. See generally R. Smolla, Law of Defamation § 12.07 [3][b] (1994 Ed.) (Professor Smolla in his treatise interpreted Liberty Lobby to require "procedural neutrality" on all Rule 56 libel issues; not just the malice issue.) This means in deciding libel cases on a motion for summary judgment, "first amendment values are not to be factored in to give [media] defendants any special advantages." Id. at 12-37 (emphasis in original). Thus, in libel cases, "weighing of the evidence and the drawing of legitimate inferences from the facts are jury functions, not those of a judge ...." Liberty Lobby, 477 U.S. at 255. Further, the test should be: "To survive the defendant's motion [for summary judgment], [plaintiff] need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine

issue of fact that requires a trial." Liberty Lobby, 477 U.S. at 257. Thus, the moving party must present evidence that "is so one-sided that [it] must prevail as a matter of law." Id. at 252.

The principles of procedural neutrality in Liberty Lobby were recently affirmed and applied by this Court in Milkovich and Masson. In Milkovich this Court held that based upon the newspaper article a reasonable factfinder could conclude that the wrestling coach had committed perjury for the purposes of a Rule 56 motion, even though other reasonable readers might not have come to that conclusion. Milkovich, 497 U.S. at 21-22, 32-33. Similarly, in Masson, this Court held that Liberty Lobby requires that all reasonable inferences and all weighing of the evidence be done in favor of the nonmoving party in a Rule 56 context, and thus if there is a close

question of whether or not a statement is substantially true, that issue must be submitted to the jury. 111 S.Ct. at 2434-36.

Since Liberty Lobby, most federal circuits have adopted the procedural neutrality principle on all defamation issues, including falsity in considering Rule 56 motions. E.g., Doe v. Doe, 941 F.2d 280, 287 (5th Cir. 1991); Anderson v. Cramlet, 789 F.2d 840, 842-43 n.** (10th Cir. 1986); Lavin v. New York News, Inc., 757 F.2d 1416, 1419 (3d Cir. 1985). However, other courts, including the Court of Appeals for the District of Columbia Circuit in Moldea II, continue to give special preference to media defendants in the summary judgment context. 22 F.2d at 317; Anderson v. Cramlet, 780 F.2d at 842 n.**. See generally R. Smolla, Law of Defamation §12.07[2][b] at 12-34.

In Moldea II, the District of Columbia Court of Appeals held that in deciding the issue of falsity, it had erred in Moldea I because it failed to follow the rule that "where the question of truth or falsity is a close one, a court should err on the side of nonactionability." App. C at 13. In following this non-neutral rule, Moldea II ignores this Court's holdings in Masson and Liberty Lobby. It claims that this Court's decision in Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986), and one of its earlier circuit defamation cases involving falsity supports this non-neutral favored position for media defendants. App. C at 13.[9] Then proceeding with its

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[9]Moldea II's reliance on Hepps, however, is misplaced because there this Court recognized that First Amendment considerations warranted that the ultimate burden of proving falsity at trial should be on the plaintiff rather than the media defendant. 475 U.S. at 476. This holding (continued...)

express non-neutral approach, the court of appeals in Moldea II found that even though a reasonable jury could have concluded that the Times' "revives the discredited notion" accusation was false for purposes of summary judgment, the question was "close to the line" and therefore Respondent was entitled to a finding of non-falsity as a matter of law. App. C at 15-18.

Moldea II did not find all reasonable inferences in favor of the nonmoving party on this challenged statement; otherwise, it could not have concluded that the question was even a close one. Indeed, the issue of falsity was so far from being one-sided, as required by Liberty Lobby, and "so close to the line" that Moldea II relied on Hepps to

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[9](...continued)
does not bear on Rule 56 procedural neutrality principles, and is not inconsistent with this Court's holdings in Masson and Liberty Lobby.

resolve the very close weighing of the evidence. App. C at 13-15. However, this explicit weighing of the evidence and favored treatment given to a media defendant is directly contrary to the procedural neutrality principles set forth in Liberty Lobby, which were recently reaffirmed and applied in Masson.

In view of the foregoing, applying the Liberty Lobby Rule 56 standard to the issue of falsity requires a reversal of Moldea II, as a matter of law. Thus, this case is ideal for this Court to resolve the Circuit conflict that exists as to whether courts are required to follow procedural neutrality principles when applying Rule 56 to the issue of "falsity" in libel cases involving media defendants.

The need for procedural neutrality in Rule 56 defamation cases is paramount because "[s]ociety has a pervasive and

strong interest in preventing and redressing attacks upon reputation." Milkovich, 497 U.S. at 22 (quoting Rosenblatt v. Baer, 383 U.S. 75, 86 (1966)). Indeed, as was noted by former Justice Stewart with particular eloquence in Rosenblatt

> [t]he right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being -- a concept at the root of any decent system of ordered liberty.
>
> * * * * *
>
> The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem. Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored.

Rosenblatt, 383 U.S. at 92-93 (Stewart, J., concurring).[10]

The need for procedural neutrality to protect Petitioner's interest is heightened all the more when a court is applying the "rational" or "supportable interpretation" standard. Moldea II's adoption of the test decidedly tips the scale in favor of media defendants. As this Court acknowledged in Masson, that standard provides the opportunity for "near absolute, constitutional protection." 111 S.Ct. at 2434.

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[10]With respect to authors whose reputations are unfairly assailed in a review of their work, a libel suit represents the only shot at vindication. This is so because it seems fairly well settled that a newspaper cannot be compelled to afford an author the opportunity to respond to an unfavorable review. Cf. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (state statute granting political candidate a right to reply to criticism in newspaper is unconstitutional).

For example, to withstand a motion for summary judgment under Moldea II, a libel plaintiff must now establish as a matter of law that no reasonable person could find the reviewer's statements are supported by the reference to the book in question.

This reality invites courts to refrain from finding all reasonable inferences in favor of the nonmoving party, and to weigh conflicting evidence in favor of the movant at the summary judgment stage, thus creating virtual per se immunity for media defendants. Such blatant non-neutrality which Moldea II represents runs counter to this Court's decisions in Liberty Lobby and Masson.

Finally, Moldea II assumes that Petitioner could establish that the alleged defamatory statements were written with knowing falsity and with the intent to injure Petitioner, but expressly held that

factor played no part in its decision. App. C at 19.[11] The failure to consider the effect that actual malice can have on "robust debate," or the value inherent in preserving the reputation of an author, who writes about controversial subjects, underscores the need for procedural neutrality in the Rule 56 context.

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[11]One of the most troubling aspects of Moldea II is the court of appeal's professed inability to redress the wrong caused by a malicious review that is written for the sole purpose of destroying an author's career.

> Any intelligent reviewer knows at some level that a book review may injure the author of a book which is its subject. Indeed, some bad reviews may be written with an aim to damage a writer's reputation. There is nothing that we can do about this, at least not without unacceptably interfering with free speech. There simply is no viable way to distinguish between reviews written by those who honestly believe a book is bad, and those prompted solely by mischievous intent.

App. C at 19-20.

In the instant case, not only did the Review damage Petitioner's reputation and substantially injure his livelihood, it also robbed society of the benefit from a robust debate about legitimate business connections with organized crime, a First Amendment consideration that requires procedural neutrality.

In sum, this is the ideal case to resolve the current conflict among the circuit courts and to make clear that the procedural neutrality principle in Rule 56 cases involving the media extends not only to the issue of malice decided in Liberty Lobby, but to the issues of verifiability and falsity.

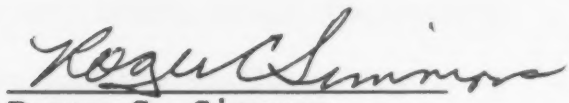
CONCLUSION

It is well-known that courts are not permitted to draw any inferences from the denial of a petition for certiorari by this

Court. However, this is a highly publicized case involving critical constitutional issues which is being closely watched for a signal from this Court. The denial of this Petition will send a clear message to those courts seeking to give the media favored treatment in the summary judgment context (through the use of the Ollman four factor test, supportable interpretation standard, non-neutral application of Rule 56 principles, or other similar technique) that their decisions will not be overturned by this Court. This would be a disastrous result, and would not serve the interests of the First Amendment.

Accordingly, Petitioner respectfully prays that his petition for certiorari be granted.

Respectfully submitted,



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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAN E. MOLDEA,

Plaintiff,

v.

Civil Action
No. 90-2053

THE NEW YORK TIMES COMPANY,

Defendant.

MEMORANDUM

This case is before the Court on defendant, the New York Times Company's, **Motion for Summary Judgment.** On February 19, 1991, the Court heard oral arguments. After careful consideration of the motion, the opposition thereto, and the entire record in this case, the Court will grant summary judgment in favor of the defendant.

I.

The facts may be briefly stated. Plaintiff is the author of Interference: How Organized Crime Influences Professional Football (Interference). In July 1989

William Morrow and Company, Inc. published Interference. On September 3, 1989, defendant, the New York Times Company, Inc. published a book review of Interference. This review was written by Gerald S. Eskenazi.

On August 24, 1990, plaintiff brought suit against defendant, seeking damages for libel and invasion of privacy as a result of the publication of Eskenazi's review. The following paragraph of defendant's above referenced book review forms the basis of plaintiff's complaint:

> . . . . For there is some really hot stuff in here, albeit warmed over. [Moldea's] examination of the 1980 Super Bowl ticket selling scandal involving Georgia Frontiere, the multimillionaire owner of the Los Angeles Rams, and her husband, Dominic, who went to prison for tax evasion, shows that greed has no bottom line. And [Moldea] raises truly disturbing questions about connections between some owners and friends who may be mob-connected, as well as about newspapers and television shows

> that regularly pander to people who bet on sports events. But there is too much sloppy journalism to trust the bulk of this book's 512 pages -- including its whopping 64 pages of notes.

Defendant responded with the present summary judgment motion, arguing that no material facts are at issue, and as a matter of law, under the First Amendment, plaintiff has not set forth any grounds for relief.

II.

Summary judgment is proper where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment must prove the lack of any genuine issue of fact. However, the

motion "is not defeated simply by a bare opinion or an unaided claim that a factual controversy persists." Alyeska Pipeline Service Co. v. U.S. E.P.A., 272 U.S.App.D.C. 355, 856 F.2d 309, 314 (D.C. Cir. 1988)(footnote omitted). When the party opposing the motion for summary judgment does not offer counter-affidavits or other evidentiary material supporting his contention that an issue of fact remains, the evidence presented by the movant must be accepted as true. See Fed. R. Civ. P. 56(e). While it is true, generally, that the Court must view the available facts in the light most favorable to the plaintiffs, Minihan v. American Pharmaceutical Ass'n, 259 U.S.App. D.C. 10, 812 F.2d 726, 727 (1987), in the instant case, the evidence presented by the

defendant must be accepted as true.[1] Thus, because there are no material facts at issue, the Court may address the question of law.

III.

Defendant argues that the complaint should be dismissed because the book reviewer's conclusion that plaintiff's book contained "too much sloppy journalism" is a nonactionable statement of opinion. Specifically, defendant asserts that under First Amendment law, a plaintiff in a libel action bears the burden of proving that a false statement of fact was published about him. Defendant argues that "too much sloppy journalism" cannot be proved true or false, but rather is an unverifiable

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[1]Because plaintiff's opposition did not contain a separate statement of material facts, the Court may properly conclude that plaintiff has conceded to defendant's statement of material facts. Local Rule 108(h).

opinion. Thus, defendant asserts that the essential element of falsity is lacking, and summary judgment in its favor is appropriate.

Plaintiff opposes summary judgment, arguing that defendant's book review contains actionable statements. Specifically, plaintiff argues that to deny summary judgment the Court need only find that statements in the review are sufficiently factual to be reasonably capable of being proved false, or that they imply undisclosed assertions of fact that are capable of being proved false or misleading.

In Milkovich v. Lorain Journal Co., -- U.S.--, 110 S.Ct. 2695 (1990), the Supreme Court was asked to recognize "in addition to the established safeguards . . . still another First Amendment-based protection for defamatory statements which are

categorized as 'opinion' as opposed to 'fact'." Milkovich, at 2705. Respondents in that case, relied on dicta in Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997 (1974), for this proposition.[2] In holding that the First Amendment does not require a separate privilege to protect statements labeled as "opinions", the Court emphasized that Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 106 S.Ct. 1558 (1986), "stands for the proposition that a statement on matters of public concern must be provable as false before there can be

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[2]Specifically, the Court in Gertz stated that:

> "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact."

418 U.S. at 339-340, 94 S.Ct. at 3007.

liability under state defamation law . . . where a media defendant is involved." Milkovich, at 2706. Further, the Court stated that Hepps ensures that "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection." Id. at 2706. Thus Milkovich did not change prior First Amendment law but simply rejected a separate constitutional privilege for statements of "opinion".

The threshold question, then, is whether or not plaintiff has met his burden of showing that the statement made in defendant's book review is provable as false. Plaintiff contends that several statements in the book review are actionable because they are sufficiently factual to be proven false and they are defamatory because they attack plaintiff's

competence and integrity in his profession. However, the Court will focus only on the portion of the book review upon which the complaint is based -- "too much sloppy journalism".[3]

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[3]Specifically, plaintiff points to the following statements, the underlined portions of which he claims have defamed him. The Court need not address these statements, however it finds that each statement is either a supported statement of fact or a non-verifiable opinion, and thus non actionable under libel law:

(1) "For there is some really hot stuff in here, albeit warmed over";

(2) "Mr. Moldea is obsessed, for example, with Joe Namath";

(3) He [Moldea] says that, as a rookie, the New York Jets' quarterback roomed with 'Joe Hirsch, who wrote a betting line and an inside information sheet on professional sports.'"

"Heady revelations -- except that the courtly Mr. Hirsch happened to be the racing columnist and chief reporter for the Morning Telegraph (now the Racing Form). He still is. He never picked horses, never wrote 'an inside information sheet'. He is in essence, the writer for the world of horse racing"

(continued...)

It is settled that "the reasonable reader . . . perus[ing] [a] column on the editorial or Op-Ed page is fully aware that

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[3](...continued)

(4) Mr. Moldea tells as well of Mr. Namath's 'guaranteeing' a victory in Super Bowl III shortly after a sinister meeting in a bar with a member of the opposition, Lou Michaels, the Baltimore Colts' place-kicker. The truth is that the pair almost came to blows after they both had been drinking; and Mr. Namath's well-publicized 'guarantee' came about quite innocently at a Miami Touchdown Club dinner when a fan asked him if he thought the Jets a chance. "We'll win. I guarantee it,' Mr. Namath replied";

(5) He revives the discredited notion that Carroll Rosenbloom . . . met foul play when he drowned in Florida 10 years ago";

(6) "The Colts 'again refused to send in kicker Myhra to end the game' with a field goal, he complains. What he doesn't state in his text is that Steve Myhra was among the worst place-kickers in the league, having missed three extra points and more than half his field-goal attempts during the season";

(7) "But there is too much sloppy journalism to trust the bulk of this book's 512 pages -- including its whopping 64 pages of notes";

the statements found there are not 'hard' news like those printed on the front page or elsewhere in the news sections of the newspaper" Ollman v. Evans, 750 F.2d 970, 981 (D.C. Cir. 1984), cert. denied, 471 U.S. 1127 (1985). Further, the Court concludes that a book review is similarly the type of article which the reasonable reader knows is comprised of the reviewer's opinion. Upon examining the statement at issue -- "too much sloppy journalism" -- in such context, it is evident that it is an unverifiable opinion, and is thus not actionable under libel law. In Liberty Lobby, Inc. v. Dow Jones & Co., Inc., 838 F.2d 1287, 1300 (D.C. Cir. 1988), the court determined that a newspaper articles' statements characterizing an attorney's oral argument as "'crude', 'ugly', 'pernicious', and 'breathtaking in its daring' . . . are clearly statements of

opinion dependent upon personal perspective." Because the Court finds that the statement on which the complaint is based similarly exemplifies a description of a literary work, from one's personal perspective, it must grant defendant's motion.

IV.

Plaintiff's complaint also states a claim for false light invasion of privacy. As a matter of law "to recover on a false light theory, plaintiff must show publication of private information which places him in a false light . . . ." See e.g. Dresbach v. Doubleday & Co., 518 F.Supp. 1285 (D.D.C. 1981). Plaintiff cannot meet the threshold burden of showing that private information was published because the publication of over 28,000 copies of Interference, is not a private event. See Complaint. Thus summary

judgment will be granted in favor of defendant on plaintiff's second claim of relief.

V.

In sum, the Court concludes that none of the parties has set forth any specific facts as being in issue and plaintiffs' claim against the defendant is not actionable as a matter of law. Thus pursuant to Rule 56 of the Federal Rules of Civil Procedure, the Court will grant summary judgment in favor of the defendant. An appropriate Order accompanies this opinion.

_____

JOHN GARRETT PENN
United States District Judge

Date: _____

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAN E. MOLDEA,

Plaintiff,

v.

Civil Action
No. 90-2053

THE NEW YORK TIMES COMPANY,

Defendant.

O R D E R

Pursuant to the Memorandum filed in this case, it is hereby

ORDERED that the defendant's **Motion for Summary Judgment** is granted, and it is further

ORDERED that this case is dismissed with prejudice.

JOHN GARRETT PENN
United States District Judge

Date: _____

APPENDIX B

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 14, 1993 Decided February 18, 1994

No. 92-7065

DAN E. MOLDEA,
APPELLANT

v.

NEW YORK TIMES COMPANY,
APPELLEE

On Appeal from the United States District Court
for the District of Columbia
(No. 90cv02053)

Roger C. Simmons argued the cause and filed the briefs for the appellant.

Bruce W. Sanford argued the cause for appellee. With him on the brief were *Henry S. Hoberman*, and *Matthew G. Weber*.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before: MIKVA, *Chief Judge*, EDWARDS and WALD, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* EDWARDS.

Dissenting opinion filed by *Chief Judge* MIKVA.

EDWARDS, *Circuit Judge*: In this appeal, Dan E. Moldea challenges the District Court's grant of summary judgment in favor of the New York Times Company, Inc. ("Times"). *Moldea v. New York Times Co.*, 793 F. Supp. 335 (D.D.C. 1992). Moldea is an investigative journalist and the author of the book *Interference: How Organized Crime Influences Professional Football* ("*Interference*"), in which he argues that the National Football League ("NFL") is tainted by connections to organized crime and professional gambling. Appellee Times published a highly unfavorable review of *Interference* ("the Times review" or "review") in the *New York Times Book Review*, a supplement to the Sunday edition of its daily newspaper.[1] Moldea contends in this suit that the Times review defamed him by assailing his competence as a journalist.

Without permitting either party to conduct discovery, the District Court ruled that the Times review was not actionable in libel because it consisted only of unverifiable statements of the reviewer's opinion of Moldea's book, or of statements that no reasonable juror could find to be false. We reverse and remand for further proceedings because the trial court erred in ruling that the Times review could not be defamatory as a matter of law. The review attacks Moldea's competence as a practitioner of his chosen profession, a matter archetypically addressed by the law of defamation. We hold that some of the challenged characterizations of *Interference* are sufficiently factual that a jury could meaningfully determine their truth or falsity. Further, while some of the review's characterizations are irrefutably true and thus not actionable, the accuracy of other statements in the review is sufficiently open to dispute that we cannot hold as a matter of law that no

[1] The full text of the book review at issue in this case is reprinted in an Appendix to this decision.

reasonable juror could find them to be false. We express no opinion on the ultimate merits of Moldea's libel claim, but we conclude that it was error for the District Court to dismiss this suit at this stage of the litigation.

Finally, we hold that the trial court erred in ruling that Moldea could not state a claim for false light invasion of privacy because he did not allege the publication of "private information." *Moldea*, 793 F. Supp. at 337. In order to state a claim for false light defamation, a plaintiff need only allege that the defendant published untrue facts concerning the plaintiff that placed him in a false light that would be highly offensive to a reasonable person, not that the defendant published "private" information.

I. Background[2]

Moldea is an investigative journalist who specializes in stories about organized crime. He is the author of numerous magazine and newspaper articles; he also has authored three books in addition to the one at issue in this case: *The Hoffa Wars: Teamsters, Rebels, Politicians and the Mob; The Hunting of Cain: A True Story of Money, Greed and Fratricide;* and *Dark Victory: Ronald Reagan, MCA and the Mob.* Moldea's most recent book is *Interference: How Organized Crime Influences Professional Football*, published in 1989 by William Morrow and Company.

The instant case grows out of a highly critical review of *Interference* that appeared in the New York Times Book Review on September 3, 1989. The review was written by Gerald Eskenazi, a sportswriter for the Times. Moldea contends that, prior to the publication of the Times review, he was a respected writer and his book had excellent prospects of success. He had embarked on a thirteen-city promotional

[2] Our statement of the facts is based on the account given by Moldea in his brief to this court. However, these facts are not relevant to our decision in this appeal, which is based solely on the written contents of *Interference* and the Times review. We express no opinion as to the accuracy of Moldea's portrayal of the facts, but leave these issues to the District Court on remand.

tour for *Interference* which included interviews on two nationally broadcast television programs, and his publisher had ordered second and third printings of the book in anticipation of strong sales. Moldea alleges, however, that the Times review's attack on his work both destroyed public interest in his book and effectively ended his career as an investigative journalist. Appellant further contends that, since the review appeared, he has been unable to interest other publishers in his work or to obtain bookings as a lecturer, activities which formerly provided him with significant income.

On August 24, 1990, Moldea filed suit against the Times alleging defamation and false light invasion of privacy. The Times moved for summary judgment before either party had begun discovery. The Times also moved for a stay of discovery, which was granted. On January 31, 1992, the District Court granted summary judgment in favor of the Times, on the ground that Moldea's claim was not actionable as a matter of law. *Moldea*, 793 F. Supp. at 338.[3]

The District Court based its ruling on a finding that the portions of the Times review to which Moldea took exception consisted only of statements of nonverifiable opinion about a literary work, or were so clearly true that no reasonable juror could find them false. Thus, the trial court concluded that it would be meaningless for either party to attempt to prove the statements' truth or falsity before a jury.

In his complaint, Moldea alleged that six specific statements in the Times review had defamed him by accusing him

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[3] In a separate order issued the same day, the District Court denied a motion by appellant to amend his complaint, in which he sought to add four causes of action based upon the Supreme Court's decision in *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513 (1991). *See Moldea v. New York Times Co.*, 793 F. Supp. 338 (D.D.C. 1992). The trial court refused permission to amend on the ground that the amended complaint could not withstand a motion to dismiss and so would be futile. *Id.* Because we remand on other grounds we need not address the claims Moldea sought to add in his amended complaint, but instruct the District Court to reconsider those claims in light of our decision in this case.

of being an incompetent practitioner of his chosen profession, investigative journalism, and by supporting that accusation with false characterizations of his book. The District Court considered only one of the challenged statements at any length. In this passage Eskenazi, after offering faint praise for some aspects of *Interference*, wrote:

> *But there is too much sloppy journalism to trust the bulk of this book's 512 pages—including its whopping 64 pages of notes.*

The phrase "too much sloppy journalism" was the focal point of the trial court's decision, and the court adjudged it "a description of a literary work from one's personal perspective." *Moldea*, 793 F. Supp. at 337. The District Court ruled in a perfunctory footnote that each of the remaining portions of the review was "either a supported statement of fact or a nonverifiable opinion." *Id.* at n.3.

Moldea contends that each of the other five statements he challenges also makes him appear to be incompetent or dishonest, and does so by making statements about his book which are verifiably false. The five additional challenged passages are as follows:

(1) *Mr. Moldea is obsessed, for example, with Joe Namath. [Moldea] says that, as a rookie, the New York Jets' quarterback roomed with 'Joe Hirsch, who wrote a betting line and an inside information sheet on professional sports.'*

> *Heady revelations—except that the courtly Mr. Hirsch happened to be the racing columnist and chief reporter for* The Morning Telegraph *(now* The Racing Form*). He still is. He never picked horses, never wrote 'an inside information sheet.' He is, in essence, the writer for the world of horse racing.*

Moldea contends that this passage is verifiably false because page 139 of *Interference* does reveal that Joe Hirsch wrote for *The Morning Telegraph*, and because that publication is in fact "an inside information sheet."

(2) *Mr. Moldea tells as well of Mr. Namath's 'guaranteeing' a victory in Super Bowl III shortly after a sinister meeting in a bar with a member of the opposition, Lou Michaels, the Baltimore Colts' place-kicker. The truth is that the pair almost came to blows after they both had been drinking; and Mr. Namath's well-publicized 'guarantee' came about quite innocently at a Miami Touchdown Club dinner when a fan asked him if he thought the Jets had a chance. 'We'll win. I guarantee it,' Mr. Namath replied.*

Moldea argues that this passage is false because his description of the Namath–Michaels meeting on pages 196–99 of his book makes no suggestion that the meeting was anything other than innocent.

(3) *[Moldea] revives the discredited notion that Carroll Rosenbloom, the ornery owner of the Rams, who had a penchant for gambling, met foul play when he drowned in Florida 10 years ago.*

According to Moldea, this passage is verifiably false because page 360 of *Interference* states that Moldea's investigations uncovered new evidence proving that Carroll Rosenbloom was not murdered.

(4) *[Moldea] also offers still another recitation of the 1958 playoff game between the Baltimore Colts, then owned by Rosenbloom, and the New York Giants. The Colts disdained a field-goal attempt in overtime, choosing instead to go for a touchdown after they got close to the goal line. Mr. Moldea's implication is that they wanted to win by more than three points to beat the point spread.*

The Colts 'again refused to send in kicker Myhra to end the game' with a field goal, [Moldea] complains. What [Moldea] doesn't state in his text is that Steve Myhra was among the worst place-kickers in the league, having missed three extra points and more than half his field-goal attempts during the season.

It is true that the *text* of *Interference* does not expressly state that Baltimore's place-kicker was among the worst in the NFL. However, a *footnote* to the book's discussion of the 1958 Colts–Giants playoff game does state that Baltimore had the second-worst field goal percentage in the NFL that year, while their quarterback and running back had very low turnover rates. *Interference*, at 444 n.1. Based on the fact that *Interference* reveals this information, Moldea argues that a jury could reasonably conclude that this passage in the Times review falsely characterized his book.

(5) *Too bad. For there is some really hot stuff in here, albeit warmed over.*

Moldea contends that this statement can be proven false because rather than being "warmed over," his book contains significant new revelations.

II. Discussion

We review the District Court's grant of summary judgment *de novo*. *See, e.g., Nikoi v. Attorney Gen. of United States*, 939 F.2d 1065, 1068 (D.C. Cir. 1991). As this case was decided solely on the basis of the written contents of *Interference* and the Times review, we are presented with a pure question of law: whether Moldea can in fact state a claim for defamation. In order ultimately to prevail at trial in this matter, appellant has a number of hurdles to clear. This appeal presents only the limited question of whether it was proper to dismiss his claim at this stage of the litigation.

Under District of Columbia law, a statement is defamatory "if it tends to injure plaintiff in his trade, profession or community standing, or lower him in the estimation of the community." *See, e.g., Afro-American Publishing Co. v. Jaffe*, 366 F.2d 649, 654 (D.C. Cir. 1966) (en banc); *Vereen v. Clayborne*, 623 A.2d 1190, 1195 n.3 (D.C. 1993). A defendant's statements must also be shown to be false by a preponderance of the evidence—truth is a complete defense to defamation. *See, e.g., Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1292 (D.C. Cir.), *cert. denied*, 488 U.S. 825 (1988).

In *White v. Fraternal Order of Police*, 909 F.2d 512 (D.C. Cir. 1990), this circuit adopted a framework for defamation actions that tends to track the RESTATEMENT (SECOND) OF TORTS § 614 (1977) ("RESTATEMENT"). The RESTATEMENT provides that, in defamation actions, the court determines "(a) whether a communication is capable of bearing a particular meaning, and (b) whether that meaning is defamatory." RESTATEMENT § 614(1). The jury then determines whether the communication was in fact so understood by its recipient. *Id.* § 614(2).

This circuit's precedents and the apparently unanimous decisions of other courts hold that whether a statement is "capable of conveying a defamatory meaning" is a question of law for the court to determine as a threshold matter. *See, e.g., White*, 909 F.2d at 518; *Tavoulareas v. Piro*, 817 F.2d 762, 779–80 (D.C. Cir.) (en banc), *cert. denied*, 484 U.S. 870 (1987); RODNEY A. SMOLLA, LAW OF DEFAMATION § 4.08 n.132 (1993) ("SMOLLA"); RESTATEMENT § 614.

"Defamatory meaning and falsity are distinct elements of the tort of defamation and are considered separately." *White*, 909 F.2d at 520. Thus, the defamatory meaning inquiry focuses only on whether a reasonable reader could understand a statement as tending to injure a plaintiff's reputation. "It is only when a court can say that the publication is not reasonably capable of any defamatory meaning and cannot reasonably be understood in any defamatory sense that it can rule as a matter of law, that it was not libelous." *Id.* at 518 (quoting *Levy v. American Mutual Ins. Co.*, 196 A.2d 475, 476 (D.C. 1964)); *see also Liberty Lobby v. Dow Jones*, 838 F.2d at 1294 (also citing *Levy*).

Assuming a statement is reasonably capable of a defamatory meaning, the trier of fact must determine if it "was actually understood by the recipient in that sense." *White*, 909 F.2d at 519; *Tavoulareas*, 817 F.2d at 779–80; SMOLLA § 4.08 n.133; RESTATEMENT § 614. The aforecited authorities agree that the intent of the speaker to convey the defamatory meaning is not relevant at this stage of the inquiry, so long as the recipient of the communication reasonably could understand it as such.

In the instant case, because the District Court ruled that Moldea could not, as a matter of law, prove falsity, it did not reach the question of whether the Times review was capable of a defamatory meaning. We find, however, that the review clearly is capable of a meaning that would tend to injure Moldea in his chosen profession, investigative journalism—indeed, Moldea alleges that the review did precisely that, and with devastating effect. The allegation that a journalist and author is "sloppy," or that his book's portrayals of central events are incorrect or misleading undoubtedly satisfies the first element Moldea must prove to state a claim for defamation.[4] Thus, we must move on to consider whether the challenged statements are verifiable, and if so, whether a reasonable juror could find them to be false.

A. *Actionable Statements Under* Milkovich *and* White

Prior to the Supreme Court's decision in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), most courts recognized a strict dichotomy in defamation actions between assertions of opinion and assertions of fact. *See, e.g., Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985). Under this practice, only false statements of fact could be defamatory; statements of "opinion" could not be defamatory because all such expression was thought to be protected by the First Amendment. As we recognized in

[4] The record in this case is plainly distinguishable from a case such as *Community for Creative Non-Violence v. Pierce*, 814 F.2d 663, 671 (D.C. Cir. 1987), in which we stated that "a suggestion of inaccuracy and of utilizing inadequate research is not defamatory." In that case, a HUD report insinuated that homelessness statistics compiled by the Community for Creative Non-Violence ("CCNV") were not drawn from systematic evidence. These facts can be distinguished from those in the present case on two grounds: The HUD report did not make manifest the connection between the inadequacy of prior research and the CCNV's role in that prior research, whereas here, Eskenazi's review obviously is addressed to Moldea's professional competence, and, more importantly, CCNV, unlike Moldea, does not stake its entire reputation on factual accuracy.

White, however, *Milkovich* rejected this practice in favor of an analysis that recognizes that statements of opinion can be actionable if they imply a provably false fact. *See White*, 909 F.2d at 522.

In *Milkovich*, a high school wrestling coach argued that an Ohio newspaper libeled him in a column which implied that he had perjured himself in a state court proceeding. The newspaper argued that, because the published material merely expressed the opinion of a writer and not an open accusation of perjury, the column could not be defamatory. The Court, however, squarely refused to recognize a separate constitutional privilege for opinion. *Milkovich*, 497 U.S. at 21. Rather, the Court in *Milkovich* held that an "opinion" exception for defamation actions was unnecessary because existing First Amendment principles ensured sufficient protection of speech. Specifically, the Court stated that its decision in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), established that, when a plaintiff seeks damages against a media defendant for speech of public concern, there is no presumption that defamatory speech is false. "In other words, the Court fashioned 'a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages.'" *Milkovich*, 497 U.S. at 16 (quoting *Hepps*, 475 U.S. at 776 (1986)).

Milkovich also held that "loose, figurative, or hyperbolic" statements generally are not actionable in defamation. 497 U.S. at 21. However, the special status of these types of expression derives from the constitutional protection provided for parody and other imaginative commentary by decisions such as *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), and *Greenbelt Cooperative Publishing Association Inc. v. Bresler*, 398 U.S. 6 (1970), rather than from any separate constitutional protection for "opinion." *Milkovich*, 497 U.S. at 20, 21. In addition to examining the specific statements challenged by the petitioner in that case, the Court in *Milkovich* noted that the "general tenor" of the article at issue did not suggest that it was intended to be hyperbolic or figurative. *Id.* at 21.

Thus, the Court in *Milkovich* concluded that "the breathing space which freedoms of expression require in order to survive is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between 'opinion' and fact." *Id.* at 19 (citation and internal quotations omitted). This is so because statements of opinion relating to matters of public concern which do not contain "a provably false factual connotation" will receive full constitutional protection. *Id.* at 20; *see also White*, 909 F.2d at 522.

In construing the bounds of *Milkovich*, the court in *White* made it clear that "even a *per se* opinion" is actionable if it can "reasonably be understood as implying provable facts." *White*, 909 F.2d at 522. The determination whether a statement should be characterized as factual or as implying provable facts is separate from the "defamatory meaning" inquiry. In *White* we first held that the statements at issue in that case were capable of bearing implied defamatory meanings, then went on to consider whether they were protected by the First Amendment as non-verifiable statements which did not imply provable facts. *See White*, 909 F.2d at 522. The judgment as to whether a challenged statement asserts actionable facts or implies such facts is a question of law for the court to determine as a threshold matter. *See* SMOLLA § 6.10.

In light of *Milkovich* and *White*, it is now clear that, in a case of this sort, the relevant inquiry is no longer simply whether a challenged statement is "fact" or "opinion." Statements of defamatory fact of course remain actionable (although truth remains a complete defense in defamation actions). The bald statement "Jones is a liar," for example, would plainly fall within the class of factual defamatory statements. *See Milkovich*, 497 U.S. at 19. In the case of assertions of "opinion," however, the analysis required by *Milkovich* is more complex. As the Supreme Court held in that case: "expressions of 'opinion' may often imply an assertion of objective fact." *Id.* at 18. To illustrate this type of expression, *Milkovich* noted that: "If a speaker says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth." *Id.* Thus, an unsupported statement of opinion that implies de-

famatory facts can be actionable. *Milkovich* further held that: "Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact." *Id.* at 18–19. Just as a speaker is not immunized from liability simply by prefacing otherwise defamatory statements with the words "In my opinion . . .," defamatory assessments based on incorrect "facts" stated by the speaker are also actionable. Thus, the statement "In my opinion Jones is a liar because he cheats on his taxes" could be libelous if the allegation of cheating were untrue.[5]

On the other hand, when a writer gives a statement of opinion that is based upon *true* facts that are revealed to readers or which are already known to readers, such opinions generally are not actionable so long as the opinion does not otherwise imply unstated defamatory facts. Because the reader understands that such supported opinions represent the writer's interpretation of the facts presented, and because the reader is free to draw his or her own conclusions based upon those facts, this type of statement is not actionable in defamation. *See Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724, 730 (1st Cir.) (contrasting *Milkovich* on the ground that in that case defendant did not reveal factual bases for his opinions and so did not "invite[ ] readers to draw their own conclusions"), *cert. denied*, 112 S. Ct. 2942 (1992); *Potomac Valve & Fitting, Inc. v. Crawford Fitting Co.*, 829 F.2d 1280, 1290 (4th Cir. 1987) (challenged statement not actionable because its "premises are explicit, and the reader

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[5] It is necessary but not sufficient that an allegedly libelous statement imply or state provably false facts. Thus, for example, when a plaintiff seeks damages against a media defendant for speech of a public concern, he or she must prove "fault" in order to prevail at trial. In some cases a plaintiff may also be required to prove that he suffered actual damages as a result of the challenged statements. In the instant case, we do not hold that Moldea has as yet made out his entire claim, or even that he may now present his case to a jury, but only that he has stated a claim that we cannot hold nonactionable at this stage of these proceedings.

is by no means required to share [defendant's] conclusion"); *Lewis v. Time, Inc.*, 710 F.2d 549, 556 (9th Cir. 1983) (no liability for defamation "where a publication sets forth [true facts] underlying its statement that someone is dishonest"). Thus, the statement "In my opinion Jones is a liar because he cheats on his taxes" would not be actionable if Jones had in fact recently been convicted of tax evasion, so long as the statement did not imply additional, unstated bases for calling Jones a liar. While it might be wholly unreasonable to attack Jones' veracity on the basis of his tax returns, a reader would be free to make his or her own assessment of the facts presented.

B. *Application of the Law to the Facts of this Case*

1. *"Sloppy Journalism"*

As we held in *White*, "even a *per se* opinion" is actionable if it can "reasonably be understood as implying provable facts." 909 F.2d at 522. Thus, if the Times review had said nothing more than "Moldea's work is sloppy journalism," this statement would be actionable because it is capable of defamatory meaning, and it reasonably can be understood to rest on provable, albeit unstated, defamatory facts. In levying the charge of "sloppy journalism," it is inescapable that Eskenazi implies *certain* facts—that Moldea plays fast and loose with his sources, that his allegations are not to be believed. Everyone who reads the charge will generally agree on its import.

It is true that whether a book is "sloppy," and indeed whether there is "too much" sloppiness, as Eskenazi stated in his review, may involve an element of subjective evaluation. However, whether an epithet represents a reviewer's "opinion" simply is not dispositive of the question before us. A bare assertion that Moldea is a practitioner of "sloppy journalism" would be precisely analogous to the Supreme Court's example in *Milkovich*: "In my opinion John Jones is a liar." 497 U.S. at 18. Although "sloppy" in a vacuum may be difficult to quantify, the term has obvious, measurable aspects when applied to the field of investigative journalism. (Simi-

larly, an accusation of "clumsy hands" may be amorphous in and of itself, but reasonable listeners would agree as to its implications when applied to a brain surgeon).[6] Given that it is defamatory publicly to disparage a person's competence in his chosen field, it simply cannot be the case that a writer may attack a person's work with impunity, and without substantiating his charges with facts, merely by using arguably imprecise terms.

Further, we think it important to make clear that, under the established case law, our analysis of this case is not altered by the fact that the challenged statements appeared in a "book review" rather than in a hard news story. To permit a defendant to escape liability for libel merely because defamatory remarks are published in a book review would be as simplistic as permitting an author to insulate himself or herself by merely prefacing assertions with the words "I think . . ." and calling everything that followed nonactionable opinion. In other words, it would make little sense to craft a rule that permitted otherwise libelous statements to go unchecked so long as they appeared in certain sacrosanct genres. In the instant case, the injury to Moldea's profes-

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[6] The dissent attempts to obscure the issue in this case by viewing Eskenazi's "sloppy journalism" charge as nothing more than an assertion that Moldea has written a " 'bad' book." This is a convenient ploy, because it allows the dissent to analyze the dispute at a level of generality inapposite to this case. In fact, Eskenazi's assessment of *Moldea* goes to the discrete and fact-bound efforts of an investigative journalist, and the assessment clearly concludes that Moldea's work as a journalist is less than competent.

There is a distinction, after all, between accusing a physician of practicing "bad science," as opposed to "clumsy brain surgery." In the instant case, Eskenazi accused Moldea not of failing in some amorphous, value-laden respect such as writing style; but rather suggested that he failed, as a journalist, to present information that was accurate and that had not been aired before. What is at issue in this case is not, as the dissent says, "a general assessment of . . . the quality of an author's book." We do not hold that it is possible to verify whether Moldea's work is in fact "sloppy;" but rather that this characterization rests on verifiable underlying facts.

sional reputation is if anything greater because Eskenazi's review appeared in a forum to which readers turn for evaluations of books. For an author, a harsh review in *The New York Times Book Review* is at least as damaging as accusations of incompetence made against an attorney or a surgeon in a legal or medical journal.

It has been suggested that, in reviews as a genre, "the object of the judgment is available to the critic's audience." *Mr. Chow of New York v. Ste. Jour Azur S.A.*, 759 F.2d 219, 228 (2d Cir. 1985). This statement, which suggests some type of doctrinal exemption for reviews generally, implies that the statements of opinion in reviews are, by definition, based on revealed premises. Obviously, this cannot be: readers use reviews to decide *whether* to look at/eat/explore the underlying object of the review. That the object itself is identified in the review is not enough. More than in other contexts, the reviewer's assessment may actually influence behavior.

We certainly do not mean to suggest that all bad reviews are actionable. We do hold, however, that assertions that would otherwise be actionable in defamation are not transmogrified into nonactionable statements when they appear in the context of a book review. This conclusion finds strong support in the Supreme Court's decision in *Milkovich*. The statements held actionable in that case appeared in an "opinion column" in a newspaper sports section, a forum well known for spirited expressions of personal opinion, but this fact played no part in the Court's analysis. *See Milkovich*, 497 U.S. at 9 (noting that court below had relied on this fact in determining that article at issue was nonactionable because it was "opinion"). As explained above, *Milkovich* held that statements which are hyperbolic, satirical, or otherwise marked as evaluations not meant to be taken literally are nonactionable only when they meet the criteria established by the Supreme Court specifically addressing such portrayals.

To assert that *Interference* is "sloppy" necessarily implies that Eskenazi concluded that it is sloppy *because of* specific shortcomings he found in the book. In order for the review to be nonactionable as a matter of law, the Times must show

that it offered true facts in support of its judgment that served to support its statement of opinion.

2. *Verifiability of Other Passages in The Times Review*

The Times review gives several examples of what Eskenazi regarded as "sloppy journalism" in *Interference*, five of which Moldea challenges in this suit. We hold that four of the five challenged passages characterize *Interference* in ways that a jury could meaningfully determine are true or false. Each of these passages is offered as an illustrative "fact" supporting the reviewer's opinion that Moldea's work is "sloppy." If a jury were to find that they are false and that Moldea had proved the other elements of his libel claim, then we hold that it could reasonably find that Moldea was libeled. Because we hold that two of the four verifiable statements cannot be deemed true *as a matter of law*, but rather must be evaluated by a jury, we remand this case for further proceedings.[7]

First, we find that the review's assertion that Moldea portrays a meeting between Joe Namath and Lou Michaels as "sinister" is verifiable, and that a reasonable juror could conclude that it is false:

> *Mr. Moldea tells as well of Mr. Namath's 'guaranteeing' a victory in Super Bowl III shortly after a sinister meeting in a bar with a member of the opposition, Lou Michaels, the Baltimore Colts' place-kicker. The truth is that the pair almost came to blows after they both had been drinking; and Mr. Namath's well-publicized 'guarantee' came about quite innocently at a Miami Touchdown Club dinner when a fan asked him if he thought*

[7] Given that we hold that the "sloppy journalism" attack would be libelous if the Times simply made that assertion without supporting facts, if the remainder of the review simply offers further opinions, then it still would be actionable in libel. As we noted in *White*, an unsupported opinion implying unstated provable facts can be actionable. *See White*, 909 F.2d at 522. Thus, the Times' argument that all of the statements supporting its conclusion that *Interference* is "sloppy" are nonverifiable subjective evaluations lends nothing to appellee's case.

> *the Jets had a chance. 'We'll win. I guarantee it,' Mr. Namath replied.*

In this passage Eskenazi attempts to support his suggestion that Moldea is an incompetent journalist by describing one of the book's alleged errors—*i.e.*, by using a fact to substantiate his opinion. Moldea argues that his book plainly reveals that the Namath–Michaels meeting was innocent.[8] The clear implication of the review passage is that Moldea, either through incompetence or an intent to mislead, suggests that the meeting was "sinister." This is an essentially factual claim—either *Interference* so describes the meeting or it does not.

In his brief and during oral argument, appellee's counsel attempted to demonstrate that the disputed passages in Moldea's book do *in fact* describe a "sinister" meeting. However, arguing that the characterizations offered in the review are *correct* is not the same as contending that they are nonverifiable—indeed, it is precisely the opposite. The arguments presented by both parties as to this statement's truth or falsity make it clear that one can adduce evidence on the issue and that a jury could meaningfully decide it. Any concerns we might otherwise have that the Times could be penalized simply because its reviewer's interpretation differs from that of a jury are allayed by the fact that in order to win at trial Moldea would be required to prove not only falsity, but also malice or fault, depending on whether he were found to be a public figure.

Given our holding that the review's characterization of Moldea's discussion is verifiable, we must next consider whether a reasonable juror could find it false. Although we express no opinion as to the truth of the review's assertion that Moldea indicates that the Namath–Michaels meeting was

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[8] The dissent observes that "the statements that the review offers to support its conclusion that Mr. Moldea mischaracterized the meeting as sinister, which are themselves verifiable, are not challenged by Mr. Moldea." Dissent at 9–10. The reason Moldea does not challenge these statements is that he *agrees* with what Eskenazi offers as "the truth" about the Namath–Michaels meeting—that it was not a "sinister" encounter. Moldea contends that he did not so portray the meeting, not that it was in fact "sinister."

"sinister," we cannot hold as a matter of law that it is true. On page 197 of *Interference*, Moldea states that Michaels told him that his meeting with Namath was "quite accidental and even confrontational." On the same page Moldea quotes Michaels as saying "What we talked about had no relationship to the game," and quotes another player present at the meeting as confirming that " 'nothing technical' about the game was discussed." The only overt suggestion in the book that the meeting could even be construed as "sinister" is Moldea's statement that "[t]hose who still insist that something about the game was suspicious call attention" to it. *Interference*, at 197. Based on our reading of *Interference*, we cannot hold that the Times review's characterization of the book's depiction of the Namath–Michaels meeting could not reasonably be found to be false.

Second, although it is a closer question, we also hold that the review's assertion that Moldea "revives the discredited notion" that Carroll Rosenbloom was murdered could be found to be false when read in the context of the book as a whole:

> *[Moldea] revives the discredited notion that Carroll Rosenbloom, the ornery owner of the Rams, who had a penchant for gambling, met foul play when he drowned in Florida 10 years ago.*

Moldea discusses Rosenbloom's drowning in pages 319 through 326 of *Interference*, closing his account with quoted observations from several of Rosenbloom's friends who speculate that he was murdered. However, later in his book, on page 360, Moldea states that he has located previously unknown photographs taken at Rosenbloom's autopsy which he presented for inspection to "several friends within the law-enforcement community." Moldea then concludes that "In short, the evidence appears to be clear that Rosenbloom died in a tragic accident and was not murdered."

It could be said that *Interference* does in fact suggest that Rosenbloom was murdered because the book mentions his friends' suspicions of foul play. At the same time, there can be no doubt that Moldea ultimately claims that he has conclu-

sively disproved this theory. We cannot hold as a matter of law that a reasonable juror could not find that the Times review did in fact mischaracterize *Interference*'s portrayal of this incident. The law of this circuit requires that the review "be taken as a whole, and in the sense in which it would be understood by the readers to whom it was addressed." *Afro-American Publishing*, 366 F.2d at 655. A jury could, taking into consideration the generally negative tone of the review as a whole, find that the implication intended by the "revives the discredited notion" passage was not simply that Moldea discusses a "discredited notion," but that Moldea does not reveal what Eskenazi implies is the well known truth about Rosenbloom's death. Read in this fashion, the Times review implies that Moldea is a poor journalist indeed—one who accepts versions of events that he should know already have been disproved; or, worse still, intentionally purveys "discredited notions" in an effort to suggest scandal where there is none.

Third, the Times review's assertion that material in *Interference* is "warmed over" is also a verifiable statement offered in support of the review's overall verdict that Moldea is a "sloppy" journalist:

> *Too bad. For there is some really hot stuff in here, albeit warmed over.*

The import of this passage is clear: Eskenazi implies that Moldea has, at some points in his book, rehashed material that has been aired before by other sources. Such a practice would, of course, reflect badly on an investigative journalist. Moldea contends that the accusation that his book contains "warmed over" material is false because *Interference* makes important new revelations. We conclude that the "warmed over" passage is verifiable; however, the text of *Interference* itself makes plain that this characterization is substantially true. The presence of *some* new material in *Interference* would not negate the review's implication that some portion of the book is old news. The Times review does not suggest that all of *Interference* is "warmed over," but merely that "*some*" of the book's revelations, though they initially seem

"hot," have in fact been revealed by previous journalistic efforts.

While we cannot establish with mathematical precision how much of *Interference* the Times would be required to prove is "warmed over" in order to verify this characterization, Moldea's book reveals that at least the portrayals the review specifically suggests are rehashed have in fact been presented before, and we hold that this is enough for the Times to avoid liability for this statement. Eskenazi wrote that Moldea offered "still another recitation" of the 1958 Colts–Giants playoff. Moldea's discussion of that game quotes from a book published in 1974 which suggests that "Football Insiders" suspect that the Colts went for a touchdown in order to beat the point spread, the very issue *Interference* addresses. *See Interference* at 90 n.1. In addition, Eskenazi dismisses suspicions that Carroll Rosenbloom might have been murdered as "discredited notions," implying that some source has previously discredited that theory. Moldea in fact writes at some length about a 1983 television special which suggested that Rosenbloom "might have been murdered," *see id.* at 358, then goes on to discuss commentaries on this special which were published in the *Chicago Tribune, Variety, Sports Illustrated,* and the *New York Times. See id.* at 360–361. By Moldea's own admission, then, his account of the controversy surrounding Rosenbloom's drowning cannot be deemed a journalistic "scoop," although, as noted above, Moldea does contend that he unearthed new information finally laying these rumors to rest.

Fourth, the review's statement that Moldea does not reveal "in his text" that the Baltimore Colts had one of the worst kickers in the league is a factual claim, but because it is true it cannot be defamatory:

> *[Moldea] also offers still another recitation of the 1958 playoff game between the Baltimore Colts, then owned by Rosenbloom, and the New York Giants. The Colts disdained a field-goal attempt in overtime, choosing instead to go for a touchdown after they got close to the goal line.*

> *Mr. Moldea's implication is that they wanted to win by more than three points to beat the point spread.*
>
> *The Colts 'again refused to send in kicker Myhra to end the game' with a field goal, [Moldea] complains. What [Moldea] doesn't state in his text is that Steve Myhra was among the worst place-kickers in the league, having missed three extra points and more than half his field-goal attempts during the season.*

No reasonable juror could disagree with the above assertion. It is true that Moldea quotes the Baltimore coach in the text of *Interference* as saying "We did not have a great placekicker" and denying that he had attempted to beat the point spread by going for a touchdown, *Interference* at 90, but Moldea does not state in his text that Steve Myhra was among the worst place-kickers in the league. Rather, it is only in a footnote to his discussion of the Colts–Giants game that Moldea states that Baltimore had the second-worst field goal percentage in the NFL. *See Interference* at 444 n.1.

Finally, the review's criticism of *Interference*'s description of *The Morning Telegraph* as an "inside information sheet" is not verifiable because it merely offers Eskenazi's evaluation of that publication in contrast to Moldea's, and reveals the factual bases for its disagreement:

> *Mr. Moldea is obsessed, for example, with Joe Namath. [Moldea] says that, as a rookie, the New York Jets' quarterback roomed with 'Joe Hirsch, who wrote a betting line and an inside information sheet on professional sports.'*
>
> *Heady revelations—except that the courtly Mr. Hirsch happened to be the racing columnist and chief reporter for* The Morning Telegraph *(now* The Racing Form*). He still is. He never picked horses, never wrote 'an inside information sheet.' He is, in essence, the writer for the world of horse racing.*

The passage offers a competing description of *The Morning Telegraph* which adequately explains the basis for the reviewer's opinion that Moldea is "sloppy" for having characterized

that publication as an "inside information sheet." Although the opinion expressed in the passage might have a defamatory implication in the context of this article—that Moldea is an incompetent journalist—it is not actionable because it permits the reader to evaluate the facts upon which it is based. Moldea argues that the passage is false because *Interference* does reveal that Hirsch wrote for *The Morning Telegraph* and that the review erroneously suggests that he did not do so. While we agree that the review does not make clear that Moldea notes the exact publication for which Hirsch wrote, the real gist of the challenged passage is that Moldea inaccurately describes *The Morning Telegraph*, not that he fails to name it.

C. *The Incremental Harm Rule*

Some of the factual evidence with which the Times review supports its assertion that *Interference* is "sloppy" is plainly true. As noted above, Eskenazi is correct that Moldea did not reveal "in his text" that Colts kicker Steve Myrha was among the worst in the NFL in 1958. In addition, Moldea does not contest the review's assertion that his book contains "several errors in spelling." We therefore must consider whether the Times can avoid potential liability on the ground that some of its factual claims are true.

This circuit has squarely rejected the argument that a false defamatory statement made among other true ones cannot be actionable because it does only "incremental harm" to a plaintiff's reputation. In *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1568 (D.C. Cir. 1984), *vacated on other grounds*, 477 U.S. 242 (1986), then-Judge Scalia held that even if some of the qualities that were correctly attributed to plaintiffs "are in fact much more derogatory than the statements under challenge, the latter cannot be said to be harmless. Even the public outcast's remaining good reputation, limited in scope though it may be, is not inconsequential."

The Supreme Court held in *Masson v. New Yorker Magazine Inc.*, 111 S. Ct. 2419, 2432 (1991), that the First Amendment does not preclude liability for defamatory statements

that cause incremental harm to a plaintiff's reputation, though it left the states free to adopt the incremental harm doctrine if they choose to do so. On remand from the Supreme Court's decision in *Masson*, the Ninth Circuit noted that it did not think that California would adopt the incremental harm rule, and quoted this court's decision in *Liberty Lobby v. Anderson* to support its observation that the doctrine seemed simply a "bad idea." *Masson v. New Yorker Magazine Inc.*, 960 F.2d 896, 898–99 (9th Cir. 1992).

In a similar vein, this court long ago held that "[p]artial truths are not necessarily even mitigating in this branch of the law, for the defamer may be the more successful when he baits the hook with truth." *Afro-American Publishing*, 366 F.2d at 655. *Afro-American Publishing* upheld a lower court's libel verdict despite the presence of true statements in the article at issue in that case. This court held that the false statements in the challenged publication "were critical in the total impact of the article," and that the article at issue must be read as a whole and in the manner it would be viewed by an average reader. *Id.*

"Substantial truth" is, however, generally regarded as a defense to defamation. *See, e.g., Liberty Lobby v. Dow Jones*, 838 F.2d at 1296 ("Slight inaccuracies of expression are immaterial provided that the defamatory charge is true in substance.") (citing RESTATEMENT § 581A cmt. f); SMOLLA § 5.09. In the instant case, the Times cannot establish on remand that the review is nonactionable merely by proving that *some* of the factual claims it makes to support its assertion that *Interference* is "sloppy" are true. Conversely, Moldea must do more than simply establish that although the bulk of the review's criticisms of his work are valid, it is marred by minor inaccuracies.[9] When a trial court can find as a matter of law that a challenged publication is substantially true, then it may properly grant judgment for the defen-

[9] It is also generally the case that when a publication is found to contain only minor errors of fact, a defamation plaintiff will have a much more difficult time proving malice or fault. *See* SMOLLA § 5.09[2].

dant. However, in a case of this sort, in which the truth or falsity of multiple statements are presented as questions of fact for the jury, it is the jury's province to determine whether the publication was sufficiently false so as to have defamed the plaintiff. *See Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1228 (7th Cir. 1993) ("Ordinarily the question whether a defamatory work is substantially true although erroneous in some details is for the jury.").

D. *Moldea's False Light Invasion of Privacy Claim*

Finally, we agree with Moldea's contention that the lower court applied an incorrect standard in dismissing his false light invasion of privacy claim. The District Court stated that, to recover for such a claim, a plaintiff "must show publication of *private information* which places him in a false light." *Moldea*, 793 F. Supp. at 337 (citing *Dresbach v. Doubleday & Co.*, 518 F. Supp. 1285 (D.D.C. 1981)) (emphasis added). Based on this erroneous statement of the law, the District Court dismissed Moldea's false light claim on the grounds that "the publication of over 28,000 copies of *Interference* is not a private event." *Id.* at 338.

The law of the District of Columbia concerning false light invasion of privacy is based on the RESTATEMENT (SECOND) OF TORTS' definition of that cause of action. *See Vassiliades v. Garfinckel's*, 492 A.2d 580 (D.C. 1985); *see also White*, 909 F.2d at 522. RESTATEMENT § 652E defines the tort as follows:

> One who falsely gives publicity to a matter concerning another that places the other in a false light is subject to liability to the other for invasion of his privacy, if
>
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Comment "a" to RESTATEMENT § 652E explains that, unlike the other privacy torts, a false light claim does not depend on the publication of private facts:

> The form of invasion of privacy covered by the rule stated in this Section does not depend on making public any facts concerning the private life of the individual. On the contrary, it is essential to the rule stated in this Section that the matter published concerning the plaintiff is not true.

There is a great deal of overlap between the causes of action for defamation and false light. The RESTATEMENT notes that the false light tort addresses situations in which a plaintiff is made to appear to be "otherwise than he is," when such a false characterization would also be highly offensive to a reasonable person. RESTATEMENT § 652E cmt. b. Publicity that is actionable in a false light claim generally will be actionable in defamation as well. A plaintiff may only recover on one of the two theories based on a single publication, but is free to plead them in the alternative. *See id.* We note, however, that a plaintiff may not avoid the strictures of the burdens of proof associated with defamation by resorting to a claim of false light invasion. *See Cohen v. Cowles Media Co.*, 111 S. Ct. 2513, 2519 (1991); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988).

The District Court erred in requiring Moldea to show that the Times had publicized private facts concerning him. We therefore remand Moldea's false light claim for further proceedings.

III. CONCLUSION

For the reasons discussed above, the judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

APPENDIX

From *The New York Times Book Review*, September 3, 1989, page 8:

Unsportsmanlike Conduct?

by Gerald Eskenazi

(Gerald Eskenazi, a sportswriter for the *New York Times*, is currently working with Carl Yastrzemski on his autobiography)

First, I've got to admit a tangled financial connection to the National Football League. My wife's first cousin married a psychiatrist whose father sold his plumbing business to a company that eventually became Warner Communications. And the owners of several football teams have a piece of Warner.

Is that clear?

Now you understand the kind of crazy-quilt tie-ins Dan E. Moldea makes in "Interference" to explain how organized crime and the N.F.L. are cozy.

Of course, Mr. Moldea, whose previous books include "Dark Victory: Ronald Reagan, MCA and the Mob," has a built-in safeguard if he is questioned about his tactics or sources or conclusions: the league, he claims, will "send its front line of defense, the loyal sportswriters, to attack the messenger." In other words, he has shielded himself in advance from criticism by people like me.

Too bad. For there is some really hot stuff in here, albeit warmed over. His examination of the 1980 Super Bowl ticket-selling scandal involving Georgia Frontiere, the multimillionaire owner of the Los Angeles Rams, and her husband, Dominic, who went to prison for tax evasion, shows that greed has no bottom line. And he raises truly disturbing questions about connections between some owners and friends who may be mob-connected, as well as about newspapers and television shows that regularly pander to people who bet on sports events. But there is too much sloppy journal-

ism to trust the bulk of this book's 512 pages—including its whopping 64 pages of notes.

Mr. Moldea is obsessed, for example, with Joe Namath. He says that, as a rookie, the New York Jets' quarterback roomed with "Joe Hirsch, who wrote a betting line and an inside information sheet on professional sports."

Heady revelations—except that the courtly Mr. Hirsch happened to be the racing columnist and chief reporter for The Morning Telegraph (now The Racing Form). He still is. He never picked horses, never wrote "an inside information sheet." He is, in essence, the writer for the world of horse racing.

Mr. Moldea tells as well of Mr. Namath's "guaranteeing" a victory in Super Bowl III shortly after a sinister meeting in a bar with a member of the opposition, Lou Michaels, the Baltimore Colts' place-kicker. The truth is that the pair almost came to blows after they both had been drinking; and Mr. Namath's well-publicized "guarantee" came about quite innocently at a Miami Touchdown Club dinner when a fan asked him if he thought the Jets had a chance. "We'll win. I guarantee it," Mr. Namath replied.

Mr. Moldea claims to be a football fan, yet his naïveté is apparent, as is his ignorance of basic sports knowledge, while several errors in spelling call into question his diligence at simple fact-checking. He misspells the name of a Heisman Trophy winner (Howard Cassady), the top thoroughbred trainer in the United States (D. Wayne Lukas) and the president of the New York Jets (Steve Gutman).

He revives the discredited notion that Carroll Rosenbloom, the ornery owner of the Rams, who had a penchant for gambling, met foul play when he drowned in Florida 10 years ago. He also offers still another recitation of the 1958 playoff game between the Baltimore Colts, then owned by Rosenbloom, and the New York Giants. The Colts disdained a field-goal attempt in overtime, choosing instead to go for a touchdown after they got close to the goal line. Mr. Moldea's

implication is that they wanted to win by more than three points to beat the point spread.

The Colts "again refused to send in kicker Myhra to end the game" with a field goal, he complains. What he doesn't state in his text is that Steve Myhra was among the worst place-kickers in the league, having missed three extra points and more than half his field-goal attempts during the season.

There may well be some insidious connection between the wise guys and the N.F.L. Then again, there may not. "Interference," with its errors and unfounded insinuations, does not settle the issue. Mr. Moldea raises the questions, but has blunted his own sword of truth.

MIKVA, *Chief Judge, dissenting:*

I. INTRODUCTION

When the Supreme Court found the dichotomy between fact and opinion "artificial" in *Milkovich v. Lorain Journal*, 497 U.S. 1, 19 (1990), it aired out a cloudy area of First Amendment law in a way that has been helpful and relatively easy for other courts to manage. I am concerned that the extra dimension placed on *Milkovich* by today's decision causes some troublesome surgery on the First Amendment and its impact on artistic expression. Analogizing a book review that complains that the author of the book under review has engaged in "too much sloppy journalism" to a charge that a brain surgeon has "clumsy hands", Maj. Op. at 14, is to equate a piano recital with medical malpractice.

The First Amendment literature has always recognized a sharp distinction between communications intended to inform and those seeking to appeal to the artistic senses. Musical criticism, for one, is rife with epithets denigrating efforts by various composers, singers, violinists, and saxophone players. None of them are conceived to involve the stuff of defamation. Even the late President Truman challenged the criticism of his daughter's singing with some zingers of his own, but not by claims of defamation. Painters, sculptors, architects, designers, playwrights, poets, movie makers, and fiction writers—all of them have had sharp comments made about their work. To say that every one of those comments is actionable as defamation because they could be shown to "rest upon provable, albeit unstated, defamatory facts," is to open up the entire arena of artistic criticism to mass defamation suits. If the statement that Mr. Moldea wrote a sloppy book is defamatory, so would be a statement that Bette Midler wore a sloppy dress, or that Oliver Stone made a sloppy film, or that Itzak Perlman had a sloppy technique, or that Lincoln Steffens played fast and loose with his analyses of reform politicians. I have no doubt that many people reading such derogatory criticism of their favorite artists might have strong feelings about the criticism. I have grave

doubt that defamation suits should be used as the arbiter of such literary and artistic tastes.

Admittedly, book reviewing is not quite as "clearly subjective" as other forms of artistic criticism. There are statements about a book that are more capable of being proven false than similar statements about a Chagall window, or even a Shaw play. But I do not know how courts could ever check the slide down the slope that the majority opinion creates today. The standard of "sloppiness" in this context is not verifiable, no matter what examples are used to sustain or reject the charge.

II. Discussion

A. *Historical Protection of Artistic and Literary Criticism.*

Potentially defamatory statements of opinion appearing in reviews have long been afforded significant protection from defamation liability, first by the common law privilege of fair comment and, more recently, by First Amendment doctrine. *See, e.g.*, Rodney A. Smolla, Law of Defamation § 6.12[7] (1993) ("As a general principle, authors, journalists, and artists invite criticism of their work product, and ... the mainstream position is clearly to construe such criticism as opinion or fair comment."). *Milkovich*, while declining to carve out a distinct privilege for all statements that could be labeled "opinion," did not significantly alter these earlier protections. What *Milkovich* did, simply, was shift the inquiry away from whether a statement could be said to be "opinion" and towards whether the statement is verifiable. Accordingly, "[b]oth as guides to the 'fact v. non-fact' distinction created in *Milkovich*, and to the future evolution of state law protection, the rich body of jurisprudence developed by lower courts during the last two decades under the rubric of the 'opinion' doctrine remains alive and well." Smolla, *supra* § 6.03[7][d].

The historical safeguards afforded reviews stem from the fact that in the realms of artistic, literary, and culinary endeavors, there are few ready yardsticks with which to measure the opinions of critics. Moreover, readers approach

literary and artistic criticism with the expectation that the opinions they express are not meant as objective statements or implications of fact. Rather, "[c]ertain formats—editorials, reviews, political cartoons, letters to the editor—signal the reader to anticipate a departure from what is actually known by the author as fact." *Milkovich, supra*, at 32 (Brennan, J., dissenting). The public nature of the work under review allows readers to arrive at their own opinions.

The current constitutional protection of nonverifiable statements of opinion can be traced to the common law privilege of fair comment. Due to a concern that defamation suits would stifle valuable public discourse, the common law recognized as an affirmative defense to a defamation action "'the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact.'" *Milkovich, supra*, at 13, *quoting* 1 F. Harper & F. James, Law of Torts § 5.28 (1956). In general, comment was privileged when it "concerned a matter of public concern, was upon true or privileged facts, represented the actual opinion of the speaker, and was not made solely for the purpose of causing harm." *Id.* at 10–11, *citing Restatement of Torts* § 606 (1938). Underlying the privilege was a desire to protect "intuitive, evaluative statements that could not be proved either true or false by the rigorous deductive reasoning of the judicial process." Mark A. Franklin & Daniel J. Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 Wm. & Mary L. Rev. 825, 871 (1984).

Critical reviews of art and literature fit neatly within the fair comment privilege, and numerous critics have successfully employed it to defend defamation actions. Generally, such reviews are based on true facts that are either stated in the review itself or readily available to the reader by reference to the work, are offered without malice, and reflect the honest and nonverifiable opinion of the reviewer. In *Fisher v. Washington Post*, 212 A. 2d 335, (D.C. 1965), for instance, the privilege was applied to a review of a gallery exposition that criticized the art as being "so badly hung among commercial paintings that what quality they might have is completely destroyed." *Id.* at 336. And in *Sullivan v. Meyer*, 141 F.2d

21 (D.C. Cir. 1944), this court ruled that it was fair comment for a journalist to characterize the plaintiff as the "author of a defeatist, anti-Jewish book."

Beginning with the Supreme Court's decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964), the nature of the fair comment privilege began to change. By stating that the Constitution requires "that a defense of fair comment must be afforded for honest expressions of opinion based upon privileged, as well as true, statements of fact," *Id.* at 292 n.30, the Court for the first time hinted at a constitutional basis for protecting statements of opinion. The Court reaffirmed this "fact-opinion" dichotomy in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), where it stated in dicta that

> [u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.

Id. at 339. *Gertz* thus "elevated to constitutional principle the distinction between fact and opinion, which had formed the basis of the doctrine of fair comment." *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir.) (*en banc) cert. denied*, 105 S. Ct. 2662 (1985). Prior to *Milkovich*, lower courts struggled to apply the somewhat illusory distinction between fact and opinion announced in *Gertz*. In *Ollman v. Evans, supra*, this court attempted to provide some degree of guidance by setting out a flexible test for distinguishing fact from opinion that took into account several factors, including the common meaning of the language used, the degree to which the statement is verifiable, the context in which the statement occurred, and the broader social context in which the statement fits. *Milkovich* implicitly rejected *Ollman*'s "totality of the circumstances" test in favor of a single inquiry into whether the alleged defamatory statement is verifiable. The factors set forth in *Ollman*—common meaning, context—remain relevant, but only to the extent they bear on the verifiability of the statement.

The *Milkovich* Court thus simplified the task of identifying protected opinion by singling out verifiability as the sole factor upon which courts should focus. But as with fact and opinion, the line separating verifiable from non-verifiable statements is not always self-evident. As one commentator has noted, "[v]erifiability is not a property that either does or does not obtain. Rather, it is a property that may be present in varying degrees." Frederick F. Schauer, *Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter*, 64 VA. L. REV. 263, 279 (1978).

B. *"Too Much Sloppy Journalism."*

The primary statement before us confirms the point. "Too sloppy" might be taken by some to mean that the book is full of specific factual inaccuracies, a charge the plaintiff could disprove by providing clear support for the statements found in the book. Others, however, might interpret the statement simply to imply that the author wrote a "bad" book, a clearly subjective and non-provable assessment. In my view, "too much sloppy journalism" contained in a book review lies somewhere between those two poles, but far too close to the nonverifiable end of the spectrum to warrant defamation liability.

Applied to another profession or contained in another context, a charge of sloppiness might indeed be actionable. A claim that a "sloppy" doctor botched an operation, for instance, would be susceptible to verification by reference to the patient's recovery, the overall record of the doctor, or some other objective measurement. Or if a product were said to be manufactured in a "sloppy" (or perhaps more aptly, "shoddy") manner, the producer might be able to prove otherwise by demonstrating, for example, that the product conforms to accepted industry specifications or has an acceptably low defect rate.

However, the inherent imprecision of the phrase "too sloppy" when coupled with its use to describe a book firmly pushes the statement at issue under the protective umbrella of non-verifiable opinion. First, the common understanding

of the word "sloppy" as used to describe a piece of writing is one that challenges objective verification. The dictionary defines "sloppy" in this context as "*carelessly* put together or performed; lacking *sound* construction." *New Webster Encyclopedic Dictionary of the English Language* (7th ed. 1971) (emphasis added). Words denoting concepts such as carelessness and soundness, though sometimes possible to objectify, are typically evaluative judgments that will differ from person to person. What constitutes sloppiness? How sloppy is too sloppy? Should spelling errors suffice or are more grievous lapses in research necessary? In whose eyes? Because of the subjective nature of the term, the recipient of a charge of sloppiness usually will be hard-pressed to disprove that insufficient care was given to the work.

Second, the overall tenor of the review suggests that the reviewer was not as much concerned with specific misstatements of objective and verifiable facts as he was with what he saw as Mr. Moldea's fundamental failure to prove the thesis of the book—his failure to produce a "smoking gun" linking the NFL to organized crime. At bottom, the review expresses a uniquely subjective evaluation of the *quality* of *Interference*. While another reader might disagree that Mr. Moldea fumbled the ball, it is difficult to see how one could *prove* the reviewer's assessment wrong as it is based largely on his particular tastes and standards. Furthermore, because the burden of proving that an allegedly defamatory statement is false lies with the plaintiff, defendants should prevail in cases like this where the verifiability of the statements at issue is doubtful. *See* SMOLLA, *supra*, § 6.07[2]. Accordingly, the phrase "too much sloppy journalism" used in a book review to describe one's writing style or research methods is simply too subjective to be verified and therefore should be protected under *Milkovich*.

This conclusion is supported, I think, not only by the vintage fair comment cases discussed above, but also by recent First Amendment precedent. In *White v. Fraternal Order of Police*, 909 F.2d 512 (D.C. Cir. 1990), the defamatory implication that the police officer had tested positive for

illegal drugs and engaged in bribery was actionable because clearly the charge could be proven true or false. In *Milkovich* itself, the implication that the wrestling coach committed perjury was similarly subject to verification. The statements involved in those cases, though cloaked as opinion, have a factual basis. Either the coach perjured himself or he didn't. Either Detective White tested positive or not. There is little room for interpretation. My understanding of the *Milkovich* principle is that these types of factual assertions should not escape defamation liability simply because they are prefaced by the words "in my opinion."

That concern is not present in cases, like this one, that involve subjective evaluations of a plaintiff's performance, particularly when they appear in a review. In *Cole v. Westinghouse Broadcasting Co., Inc.*, 435 N.E.2d 1021 (Mass. 1982), for instance, the Supreme Judicial Court of Massachusetts held nonactionable statements remarkably similar to those at issue here. In that case, a terminated television reporter brought a defamation action against his former employer for issuing a statement that the newscaster's firing was a result of his "sloppy and irresponsible reporting." Holding that the statement could not form the basis of a defamation action, the court stressed its subjective nature:

> . . . [T]he statements made by [the defendant] can only be viewed as expressions of opinion regarding Cole's reporting abilities. Whether a reporter is sloppy and irresponsible with bad techniques is a matter of opinion. *The meaning of these statements is imprecise and open to speculation. They cannot be characterized as assertions of fact. They cannot be proved false.*

Id. at 1027 (emphasis added).

In *Stuart v. Gambling Times, Inc.*, 534 F. Supp. 170 (D.N.J. 1982), a book review of the plaintiff's gaming manual charged that its publication and sale was "the # 1 fraud ever perpetrated upon the gambling public." The court held that in the context of a book review, the statement could not reasonably be understood as actually accusing the author of

fraud (a verifiable fact), but rather, was simply the opinion of the reviewer. *Id.* at 172.

Likewise, in *Mr. Chow v. Ste. Jour Azur*, 759 F.2d 219 (2d Cir. 1985), a defamation action involving an unfavorable review of the food and service offered by a Chinese restaurant, the Second Circuit ruled that five of six challenged assertions in the review were protected as non-verifiable statements of opinion. The only statement in the review that the court viewed as verifiable concerned the number of dishes in which the restaurant served its Peking Duck. *Id.* at 226–27. As to the other statements, the court noted that "an average reader approaches a review with the knowledge that it contains only one person's views...." *Id.* at 227–28. As a result, the court found the statements "incapable of being proved false." *Id.* at 229.

Another analog to this case might be the traditional "Monday morning quarterback" column in the sports section of the newspaper. If the local columnist calls for the head coach's resignation for incompetent play-calling, the reader reasonably should understand the column to reflect the personal opinion of the sportswriter. Whether ninety-nine out of a hundred readers agree or disagree with the assessment is immaterial. The opinion is non-verifiable because it so clearly represents the subjective interpretation of one person. The case would be different if the columnist expressed an opinion, without stating its basis, that the coach was drunk, paid off the referees, or failed to show up for practice all week. Each of these opinions connotes facts that can be proved true or false. A general assessment of a coach's ability—or the quality of an author's book—does not.

I do not advocate the creation of a wholesale defamation privilege for statements appearing in literary or artistic criticism. My colleagues are correct, of course, that it would be unwise "to craft a rule that permitted otherwise libelous statements to go unchecked so long as they appeared in certain sacrosanct genres." Maj. Op. at 14. The majority is equally unwise, however, to ignore altogether the effect of the communicative vehicle upon the audience. *See Id.* ("... our

analysis of this case is not altered by the fact that the challenged statements appeared in a 'book review.' "). As explained above, this view runs contrary to a long history of defamation jurisprudence which recognizes that reviews are generally offered, and reasonably received, as statements of subjective, non-verifiable opinion rather than fact. Reviewers should escape defamation liability unless they attempt to smuggle defamatory and verifiable facts about the author under the guise of criticism. Such is not the case here.

C. *The Secondary Statements.*

As for the other passages challenged by Mr. Moldea, the two that cause the majority the most concern are those regarding the alleged "sinister" meeting between Joe Namath and Lou Michaels and the "revival" of allegations that foul play was involved in the death of Rams' owner Carrol Rosenbloom.

1. *The "sinister" statement.* In my view, the review's implication that Mr. Moldea painted the Namath–Michaels meeting as "sinister" is protected, non-verifiable opinion. The dictionary defines "sinister" as it is used this context as "presaging ill-fortune or trouble." *Webster's Ninth New Collegiate Dictionary* (1984). The issue here is not whether the meeting in fact "presaged trouble"—the fixing of Superbowl III—but whether Mr. Moldea fairly can be said to have given readers that impression. The reviewer expressed the opinion that he did. This conclusion, the basis of which is readily available to all, is the reviewer's and his alone. As such, it cannot be proven false, just as an opinion that a person has a "sinister" disposition or "sinister" facial expression cannot be proven false. Had the review stated that Mr. Moldea mischaracterized the meeting by *using* the word sinister, then such an allegation could be proven false. But while my colleagues are correct that the "sinister" characterization is open to debate, debatable does not mean verifiable. Moreover, the statements that the review offers to support its conclusion that Mr. Moldea mischaracterized the meeting as

sinister, which are themselves verifiable, are not challenged by Mr. Moldea.

2. *The Rosenbloom allegation.* The Rosenbloom allegation also is not independently actionable. It is either supported by reference to the book or non-verifiable opinion depending upon what meaning one gives to the word "revive." The common understanding of "revive" as it is used in the review is to "bring back" or "renew in the mind or memory." *See Webster's Ninth New Collegiate Dictionary* (1984). In other words, to revive is simply to "recall" or "discuss anew." Therefore, unlike the charges of "sloppiness" or "sinister" behavior, which involve qualitative assessments, the statement that Mr. Moldea "revived a discredited notion" is largely value-neutral. It can be verified by looking to the book itself. Doing so, however, reveals that Mr. Moldea does in fact "bring back" or "discuss anew" admittedly old accusations surrounding Mr. Rosenbloom's death. *See, e.g., Interference* at 324 ("In the wake of Rosenbloom's funeral, numerous questions arose about the circumstances of his death, which have challenged the contention that he drowned by accident. It was suggested by some that Rosenbloom might have been murdered.... Could Rosenbloom's death have been anything but an accidental drowning? If it was not, there was a whole cast of characters who would have had the means, opportunity, and motive."); at 325 (Nevertheless, rumors of foul play persisted."). In light of these passages, the review's statement that Mr. Moldea "revived" the accusations is patently accurate and thus cannot be the basis for defamation liability.

Mr. Moldea contends that by saying that he "revived" the Rosenbloom allegations, the review implies that Mr. Moldea actually subscribes to them, when in fact he acknowledges in the book that the allegations have been discredited. But even if we were to take "revive" to mean "to dignify or credit" (or if the review used those exact words), I am still not convinced that the statement would be actionable because, like the "sinister" characterization, it is based not on provable facts but on an non-verifiable interpretation of one reviewer.

We may disagree with that interpretation upon reading the book, but we cannot prove it false.

III. Conclusion

If Mr. Moldea takes issue with the *New York Times*' characterization of his book, his remedy should not lie in a defamation suit. He should rely instead on other reviewers, and the book itself, to prove his work worthy of its claims. Today's holding, I fear, absolves Mr. Moldea and others of that responsibility and may significantly affect the freedom with which reviewers go about their jobs. Fear of legal reprisal threatens to cause reviewers to retreat to rhetorical excess instead of explaining their gripe and attempting to support it by reference to the work under review. Such a result would chill the informative and lively public discourse that frequently accompanies the publication of an influential book.

The current controversy that surrounds a review of Catharine MacKinnon's *Only Words* is a case in point: often the review—positive or negative—succeeds in inspiring discussion and emotion over the relevant subject matter to a greater degree than the work itself. *See David Streitfeld, Rape by the Written Word?: Book Review Sparks Pornography Debate*, Wash. Post, Jan. 4, 1994 at C1. For these reasons, ready imputation of defamatory factual assertions in artistic and literary reviews, rather than protecting the writers and artists, actually strikes me as dangerous to their collected reputations and no service to connoisseurs of criticism.

The reviewing of books is an art form almost as old as civilization. The more important the book, the more controversial the reviews. Courts should be most hesitant to assume an arbiter's role in this most delicate area of First Amendment speech. While the designation of speech as a "book review" should not automatically exempt it from the libel laws, any more than the "opinion" label enshrines other speech, the "sloppiness" of the reviewer's work should be left to the readers to determine, rather than for judges or juries to ordain. I would uphold the district court's grant of summary judgment in favor of the *Times*.

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APPENDIX C

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 14, 1993 Decided May 3, 1994

No. 92–7065

DAN E. MOLDEA,
APPELLANT

v.

NEW YORK TIMES COMPANY,
APPELLEE

On Appeal from the United States District Court
for the District of Columbia
(No. 90cv02053)

On Appellee's Petition for Rehearing

Roger C. Simmons argued the cause and filed the briefs for the appellant.

Bruce W. Sanford argued the cause for appellee. With him on the brief were *Henry S. Hoberman*, and *Matthew G. Weber*.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before: MIKVA, *Chief Judge*, WALD and EDWARDS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* EDWARDS.

EDWARDS, *Circuit Judge:* I often have been struck by Justice Stewart's concurring statement in *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970), a case in which the Court reconsidered and overruled an earlier decision. Justice Stewart remarked that, "[i]n these circumstances the temptation is strong to embark upon a lengthy personal *apologia*." *Id.* at 255. This remark has special poignancy for me now, because it underscores the distress felt by a judge who, in grappling with a very difficult legal issue, concludes that he has made a mistake of judgment. Once discovered, confessing error is relatively easy. What is difficult is accepting the realization that, despite your best efforts, you may still fall prey to an error of judgment. Like Justice Stewart, I will take refuge in an aphorism of Justice Frankfurter:

> Wisdom too often never comes, and so one ought not to reject it merely because it comes late.

Henslee v. Union Planters Nat. Bank & Trust Co., 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting).

In *Moldea v. New York Times Co.*, 15 F.3d 1137 (D.C. Cir. 1994) ("Moldea (I)"), this panel was faced with an appeal brought by author and investigative journalist Dan E. Moldea in connection with his defamation action against the New York Times Company, Inc. ("Times"). Moldea's lawsuit alleged that appellee libeled him in a book review (the "Times review" or "review") published in the *New York Times Book Review*, a supplement to the Sunday edition of its daily newspaper. The review stated that Moldea's book, *Interference: How Organized Crime Influences Professional Football* ("*Interference*"), was marred by "too much sloppy journalism," and offered a number of examples of the work's alleged journalistic shortcomings. The District Court granted summary judgment in favor of the Times, ruling that the review in question was not actionable as a matter of law

because it consisted only of unverifiable statements of the reviewer's opinion, or of statements that no reasonable juror could find to be false. *Moldea v. New York Times Co.*, 793 F. Supp. 335 (D.D.C. 1992). In a 2–1 decision, the panel reversed on the ground that some of the review's characterizations of Moldea's book were potentially actionable because they were verifiable, and could not be held to be true as a matter of law. *Moldea (I)*, 15 F.3d at 1146–48.

After careful consideration of the Times' petition for rehearing and Moldea's response to that petition, we are persuaded to amend our earlier decision. The original majority opinion was generally correct in its statement of the law of defamation. Unfortunately, that opinion failed to take sufficient account of the fact that the statements at issue appeared in the context of a book review, a genre in which readers expect to find spirited critiques of literary works that they understand to be the reviewer's description and assessment of texts that are capable of a number of possible rational interpretations. While there is no *per se* exemption from defamation for book reviews, our initial resolution of this case applied an inappropriate standard to judge whether the Times review was actionable.

In light of our reconsideration of this case, we hold that the challenged statements in the Times review are supportable interpretations of *Interference*, and that as a matter of law the review is substantially true. Accordingly, we affirm the District Court's grant of summary judgment in favor of the Times.

I. Background

The facts of this case are fully explained in *Moldea (I)*, so we need only briefly sketch them here. The instant case grows out of a highly negative review of *Interference* written by *New York Times* sportswriter Gerald Eskenazi, and published in the *New York Times Book Review* on September 3, 1989.[1] Moldea contends that prior to the publication of this review he was a respected author and journalist, and that

[1] The full text of the Times review is reprinted as an appendix to our opinion in *Moldea (I)*.

both he and his publisher anticipated that *Interference*, his fourth book, would be a success. Appellant alleges that the review's harsh critique of *Interference* destroyed the book's prospects for commercial success, and effectively ended his career as a writer as well, because he is now unable to interest other publishers in his work. Appellant also claims that, because of the review, he can no longer obtain bookings for lectures and other public appearances, activities which formerly provided him with significant income.

On August 24, 1990, Moldea filed suit against the Times alleging defamation and false light invasion of privacy. The Times moved for summary judgment before either party had begun discovery, and, on January 31, 1992, the District Court granted the Times' motion based solely on the texts of the review and of *Interference* itself. The trial court ruled that Moldea's claim was not actionable as a matter of law because the portions of the Times review challenged in his suit either were statements of opinion about a literary work, or were so clearly true that no reasonable juror could find them to be false. *Moldea*, 793 F. Supp. at 338.

In the District Court and on appeal, Moldea alleged that six specific statements in the Times review had defamed him by accusing him of being an incompetent practitioner of his chosen profession, investigative journalism, and by supporting that accusation with false characterizations of his book. We held in *Moldea (I)* that one of these passages was a statement of opinion that implied defamatory facts because it accused Moldea of being an incompetent journalist. That statement read:

> *But there is too much sloppy journalism to trust the bulk of this book's 512 pages—including its whopping 64 pages of footnotes.*

See Moldea (I), 15 F.3d at 1145–46. *Moldea (I)* went on to hold that the remaining statements Moldea challenged were offered by Eskenazi as factual examples of *Interference*'s alleged "sloppiness," and that "[i]n order for the review to be nonactionable as a matter of law, the Times must show that it

offered true facts in support of its judgment that served to support its statement of opinion." *Id.* at 1146.

Our earlier decision in this case held that three of the five remaining statements challenged by Moldea on appeal were not actionable in defamation. Of the three nonactionable passages, two were incontrovertibly true statements based upon facts revealed in the text of *Interference*, while the third was a supported statement of opinion. *See id.* at 1146–49. *Moldea (I)* held, however, that two of the challenged passages in the Times review were verifiable, and that a reasonable juror could conclude that they were false. First, the review stated:

> *Mr. Moldea tells as well of Mr. Namath's 'guaranteeing' a victory in Super Bowl III shortly after a sinister meeting in a bar with a member of the opposition, Lou Michaels, the Baltimore Colts' place-kicker. The truth is that the pair almost came to blows after they both had been drinking; and Mr. Namath's well-publicized 'guarantee' came about quite innocently at a Miami Touchdown Club dinner when a fan asked him if he thought the Jets had a chance. 'We'll win. I guarantee it,' Mr. Namath replied.*

Second, the review opined that:

> *[Moldea] revives the discredited notion that Carroll Rosenbloom, the ornery owner of the Rams, who had a penchant for gambling, met foul play when he drowned in Florida 10 years ago.*

Our initial opinion in this case concluded that a reasonable juror could find that the Times review had mischaracterized *Interference*'s portrayal of each of the foregoing two events. Accordingly, we held that it was error for the trial court to grant summary judgment at so early a stage of this litigation.

II. Discussion

A. *The Importance of Context*

Moldea (I) noted that, "under the established case law, our analysis of this case is not altered by the fact that the challenged statements appeared in a 'book review' rather than in a hard news story." *Moldea (I)*, 15 F.3d at 1145–46. This statement is correct insofar as it suggests that there is no *per se* exemption from defamation for book reviews. Even the Times concedes this point in its Petition for Rehearing. *See* Petition for Rehearing at 4 ("No one doubts that a book review can be actionable."). A writer may not commit libel at will merely by labelling his work a "review." *Moldea (I)* is short-sighted, however, in failing to take account of the fact that the challenged statements were evaluations of a literary work which appeared in a forum in which readers expect to find such evaluations. As the Supreme Court has recognized, writers must be given some leeway to offer "rational interpretation" of ambiguous sources. *See Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419, 2434 (1991). Thus, when a reviewer offers commentary that is tied to the work being reviewed, and that is a supportable interpretation of the author's work, that interpretation does not present a verifiable issue of fact that can be actionable in defamation.

The fundamental framework established in *Moldea (I)* for defamation actions is sound, and we do not modify it in this decision. As we stated in our initial opinion, the Supreme Court's decision in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), and this court's decision in *White v. Fraternal Order of Police*, 909 F.2d 512 (D.C. Cir. 1990), make clear that there is no wholesale exemption from liability in defamation for statements of "opinion." Instead, statements of opinion can be actionable if they imply a provably false fact, or rely upon stated facts that are provably false. *See generally Moldea (I)*, 15 F.3d at 1143–45.

In *Milkovich*, the Supreme Court rejected the argument that an accusation of perjury was nonactionable merely because it was offered as the writer's "opinion." In that case, a high school wrestling coach argued that an Ohio newspaper libeled him by printing a column which alleged that he had

perjured himself in his testimony to a state court concerning his role in an altercation between his team and an opposing squad at a wrestling match. The column stated that: "Anyone who attended the meet ... knows in his heart that Milkovich ... lied at the hearing." *Milkovich*, 497 U.S. at 5. Although the statements at issue in *Milkovich* appeared in an "opinion column" in a newspaper sports section, the Court found no relevance in this fact in reaching its decision, apparently because an accusation of perjury is not the sort of discourse that even arguably is the usual province of such columns.[2] Sports columnists frequently offer intemperate denunciations of coaches' play-calling or strategy, and readers know this and presumably take such railings with a grain of salt; but an accusation of criminal conduct is a classic libel, and so *Milkovich* did not even pause to assess the effect that the column's context may have had on those who read it.

In *Moldea (I)*, this court observed that *Milkovich* made no mention of the fact that the statements at issue in that case appeared in a sports column, and took that fact to mean that context was irrelevant in the instant case. We now recognize, however, as has the First Circuit, that *Milkovich* did not disavow the importance of context, but simply "discounted it in the circumstances of that case." *Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724, 729 n.9 (1st Cir. 1992) (holding newspaper theater column nonactionable in part because "the context of each article rendered the language not reasonably interpreted as stating 'actual facts' about appellant's honesty."), *cert. denied*, 112 S. Ct. 2942 (1992).

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[2] *Milkovich* did briefly address whether the "general tenor" of the column negated the impression that the "writer was seriously maintaining that petitioner committed the crime of perjury," 497 U.S. at 21, but this assessment had to do with whether the statements at issue in that case were intended as hyperbole, not with the genre in which they appeared. The Court's decision in *Milkovich* provided that "loose, figurative, or hyperbolic" statements generally are not actionable in defamation, but this status derives from the constitutional protection afforded to parody, satire, and other imaginative commentary, not from a privilege for "opinion." *See Moldea (I)*, 15 F.3d at 1143–44.

This conclusion is compelled by the logic of two Supreme Court cases expressly reaffirmed in *Milkovich*, and by the Court's decision in *Masson*, rendered the following term.

First, *Milkovich* reaffirmed the vitality of *Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6 (1970), and *Letter Carriers v. Austin*, 418 U.S. 264 (1974). *See Milkovich*, 497 U.S. at 16–17. In *Bresler*, a real estate developer had engaged in negotiations with a city council for a zoning variance, while simultaneously negotiating with the city over other land that the city wished to purchase from him. A local newspaper account stated that some people had characterized the developer's tactics as "blackmail," and the developer sued for libel. The Court rejected the developer's argument that "blackmail" implied criminal activity, noting that "the word 'blackmail' *in these circumstances* was not slander when spoken...." *Bresler*, 398 U.S. at 13 (emphasis added). In *Letter Carriers*, the Court held that the use of the word "traitor" to define a "scab" in the context of a labor dispute could not be the basis for a defamation action. 418 U.S. at 271–72, 284–86. Both *Bresler* and *Letter Carriers* rely in large part on the notion that the speech at issue in each case was intended as hyperbole, *see Milkovich*, 497 U.S. at 20; however, this fact reinforces the importance of context, because it is in part the *settings* of the speech in question that makes their hyperbolic nature apparent, and which helps determine the way in which the intended audience will receive them. Thus, the "lusty and imaginative expression of the contempt felt by union members" for a "scab" may lawfully find hyperbolic expression during a strike, *Letter Carriers*, 418 U.S. at 286, because the context assures that no reader could understand the epithet "traitor" to be a charge that the "scab" has committed the criminal offense of treason. *Id.* at 285.

Second, *Masson*, handed down in the term following *Milkovich*, is further evidence that the Supreme Court has not abandoned the consideration of context in defamation actions. In *Masson*, the Court addressed the question whether a writer's alteration of quotations attributed to the subject of an interview could establish the "actual malice" required for a defamation suit by a public figure. *Masson* observed that

whether quotations will be interpreted by readers as the actual statements of a speaker depends on context—for example, whether there is "an acknowledgment that the work is a so-called docudrama or historical fiction, or that it recreates conversations from memory, not from recordings...." *Masson*, 111 S. Ct. at 2430–31.

In *Ollman v. Evans*, 750 F.2d 970, 983 (D.C. Cir. 1984) (*en banc*), *cert. denied*, 471 U.S. 1127 (1985), we recognized that courts have long "considered the influence that ... well-established *genres* of writing will have on the average reader." *Id.* at 984 (emphasis in original). Given that *Milkovich* was decided against the backdrop of this settled principle, and that it expressly reaffirmed two of the Court's key precedents in this area, we are, on reflection, convinced that *Moldea (I)* erred in assuming that *Milkovich* abandoned the principle of looking to the context in which speech appears. The Court's decision in *Masson* appears to confirm this interpretation of *Milkovich*. While *Milkovich* could be interpreted as we read it in our initial decision, we are unwilling to assume that the Court meant to sweep away so much settled law without a clearer indication that this was indeed its intent.

B. *Relevance of the Book Review Context*

In contrast to the situation in *Milkovich*, the instant case involves a context, a book review, in which the allegedly libelous statements were evaluations quintessentially of a type readers expect to find in that genre. The challenged statements in the Times review consist solely of the reviewer's comments on a literary work, and therefore must be judged with an eye toward readers' expectations and understandings of book reviews. This would not be the case if, for example, the review stated or implied that *Interference* was a badly written book because its author was a drug dealer. In that situation, this case would parallel *Milkovich*: the reviewer would simply be employing the medium of a book review as a vehicle for what would be a garden-variety libel, and the review would thus potentially be actionable.

There is a long and rich history in our cultural and legal traditions of affording reviewers latitude to comment on

literary and other works. The statements at issue in the instant case are assessments of a book, rather than direct assaults on Moldea's character, reputation, or competence as a journalist. While a bad review necessarily has the effect of injuring an author's reputation to some extent—sometimes to a devastating extent, as Moldea alleges is true here—criticism's long and impressive pedigree persuades us that, while a critic's latitude is not unlimited, he or she must be given the constitutional "breathing space" appropriate to the genre. *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964).

We believe that the Times has suggested the appropriate standard for evaluating critical reviews: "The proper analysis would make commentary actionable only when the interpretations are *unsupportable by reference to the written work.*" Petition for Rehearing at 8 (emphasis added). This "supportable interpretation" standard provides that a critic's interpretation must be rationally supportable by reference to the actual text he or she is evaluating, and thus would not immunize situations analogous to that presented in *Milkovich*, in which a writer launches a personal attack, rather than interpreting a book. This standard also establishes boundaries even for textual interpretation. A critic's statement must be a rational assessment or account of something the reviewer can point to *in the text*, or *omitted from the text*, being critiqued. For instance, if the Times review stated that *Interference* was a terrible book because it asserted that African-Americans make poor football coaches, that reading would be "unsupportable by reference to the written work," because nothing in Moldea's book even hints at this notion. In such a case, the usual inquiries as to libel would apply: a jury could determine that the review falsely characterized *Interference*, thereby libeling its author by portraying him as a racist (assuming the other elements of the case could be proved).

Our decision to apply the "supportable interpretation" standard to book reviews finds strong support in analogous decisions of the Supreme Court, all decided or reaffirmed after *Milkovich*. These cases establish that when a writer is evaluating or giving an account of inherently ambiguous materials or subject matter, the First Amendment requires that the courts allow latitude for interpretation. For example, in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), a decision the Court discussed and reaffirmed in *Masson*, a reviewer writing for *Consumer Reports* magazine described the experience of listening to music through a pair of stereo speakers: "[I]ndividual instruments heard through the Bose system seemed to grow to gigantic proportions and tended to wander about the room." *Bose*, 466 U.S. at 488. Bose Corporation sued for defamation, alleging that the reviewer's unflattering portrayal was factually inaccurate. The Court held that the statements were not actionable, because they were not so obviously false as to sustain a finding of "actual malice." As the Court interpreted *Bose* in *Masson*:

> [T]he result was not an assessment of events that speak for themselves, but "one of a number of possible rational interpretations of an event that bristled with ambiguities and descriptive challenges for the writer." We refused to permit recovery for choice of language which, though perhaps reflecting a misconception, represented "the sort of inaccuracy that is commonplace in the forum of robust debate to which the *New York Times* rule applies."

Masson, 111 S. Ct. at 2434 (quoting *Bose*, 466 U.S. at 512, 513) (internal citation omitted).

The Court's opinion in *Bose* relied heavily on its earlier decision in *Time, Inc. v. Pape*, 401 U.S. 279 (1971). *Pape* reversed a libel judgment against a reporter who had summarized a report by the United States Commission on Civil Rights discussing civil rights abuses by police officers. The article quoted the Commission's summary of the facts of an alleged incident of police brutality, but failed to state that the Commission had qualified its remarks by noting that they were taken from a civil complaint. As in *Bose*, the Court held

that the claim was not actionable because the publication was not sufficiently false to sustain a finding of "actual malice." *See Masson*, 111 S. Ct. at 2434. *Masson* explained that *Pape* "distinguished between a 'direct account of events that speak for themselves' and an article descriptive of what the Commission had reported. *Time, Inc. v. Pape* took into account the difficult choices that confront an author who departs from direct quotation and offers his own interpretation of an ambiguous source." *Masson*, 111 S. Ct. at 2434 (quoting *Pape*, 401 U.S. at 285) (internal citation omitted).

Finally, *Masson* itself noted that: "The protection for rational interpretation serves First Amendment principles by allowing an author the interpretive license that is necessary when relying upon ambiguous sources." 111 S. Ct. at 2434. *Masson* concluded that in order to state a claim for defamation based upon the alteration of direct quotations, a plaintiff must show that the alterations resulted in "a material change in the meaning conveyed by the statement." *Id.* at 2433.[3] Although *Masson*, *Bose* and *Pape* all concerned the evidence necessary to establish "actual malice," those decisions are rooted in the question of a plaintiff's ability to prove *falsity* so as to show that a defendant presented information he or she knew to be false.[4] Because of their focus on falsity, the

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[3] *Masson* rejected a "rational interpretation" standard for quotations that are purportedly the actual words of a speaker, because such quotations signal readers that the quoted material is something more than just the writer's "interpretation." *See Masson*, 111 S. Ct. at 2433, 2434. In short, direct quotations are "the quintessential 'direct account of events that speak for themselves.' " *Id.* at 2434 (quoting *Pape*, 401 U.S. at 285). In the instant case, the Times review at no point purported to quote from *Interference*, but rather offered what was plainly the reviewer's interpretation of the book. Thus, in this regard, the instant case is much more like *Bose* and *Pape* than it is like *Masson*, and the "supportable interpretation" standard is appropriate.

[4] We express no opinion as to whether the "actual malice" standard would apply in Moldea's case, and do not limit application of

reasoning of these decisions is fully applicable to the instant case. *Masson*, *Bose* and *Pape* recognized that some materials by their very nature require interpretation, and that the First Amendment affords latitude to those engaged in that task. Reasonable minds can and do differ as to how to interpret a literary work. Accordingly, as *Masson* counsels, we must allow a degree of "interpretive license." 111 S. Ct. at 2434.

C. *Application of the "Supportable Interpretation" Standard to the Times Review*

As we noted in our initial decision, this appeal presents a pure question of law, which we review *de novo:* whether Moldea can in fact state a claim for defamation. *Moldea (I)*, 15 F.3d at 1142. In this situation, we must determine as a threshold matter whether a challenged statement is capable of a defamatory meaning; and whether it is verifiable—that is, whether a plaintiff can prove that it is false. *See generally, id.* at 1142–45. The Times review is, as we previously held, capable of a defamatory meaning insofar as it tends to injure Moldea's reputation as a practitioner of his chosen profession, investigative journalism. The key to this case is the question of verifiability.

Although *Moldea (I)* held that the Times review's statement that *Interference* contained "too much sloppy journalism" was a verifiable assessment of the book, we now recognize that, in the context of a book review, it is highly debatable whether this statement is sufficiently verifiable to be actionable in defamation. Arguably, our decision in *Moldea (I)* failed adequately to heed the counsel of both the Supreme Court and our own precedents that "[w]here the question of truth or falsity is a close one, a court should err on the side of nonactionability." *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1292 (D.C. Cir.) (citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986)), *cert. denied*, 486 U.S. 825 (1988). "The First Amendment

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the "supportable interpretation" standard to cases in which proof of actual malice is required.

requires that we protect some falsehood in order to protect speech that matters." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974). The Court has cautioned in several cases that the First Amendment preserves a "breathing space" essential to the exercise of freedom of the press. "To that end [the Supreme] Court has extended a measure of strategic protection to defamatory falsehood." *Id.* at 342.

However, we need not determine whether "too much sloppy journalism" is verifiable, as the statements that the Times review offers in support of this assessment are supportable interpretations of *Interference.* Thus, even if the review's assertion that the book contains "too much sloppy journalism" is verifiable, that assessment is supported by revealed premises that we cannot hold to be false in the context of a book review. As we stated in *Moldea (I):* "Because the reader understands that such supported opinions represent the writer's interpretation of the facts presented, and because the reader is free to draw his or her own conclusions based upon those facts, this type of statement is not actionable in defamation." *Moldea (I),* 15 F.3d at 1144–45.

As we noted above, *Moldea (I)* held that only two of the five challenged passages in the Times review could be proven to be false; the other three were held either to be true, or to be supported statements of opinion. In addition, Moldea did not challenge the review's assertion that *Interference* contains several spelling errors which the reviewer concluded "call into question [Moldea's] diligence at simple fact-checking." Thus, only two passages in the Times review are even potentially actionable: the statement that *Interference* "revives the discredited notion" that Carroll Rosenbloom was murdered, and the claim that Moldea described a meeting between opposing players just before the 1969 Super Bowl as "sinister."

Our initial decision in this case erred by basing its holding on a standard that failed to take into account the fact that the challenged statements appeared in the context of a book review, and were solely evaluations of a literary work. *Moldea (I)* considered whether a reasonable jury *could find* that the challenged statements were false because they mischarac-

terized *Interference*. *See Moldea (I)*, 15 F.3d at 1146, 1147. Such a standard might be appropriate in the case of an ordinary libel such as that at issue in *Milkovich*, but it is an inappropriate measure of an interpretation of a book. Applying the "supportable interpretation" standard, the correct measure of the challenged statements' verifiability as a matter of law is whether *no reasonable person could find* that the review's characterizations were supportable interpretations of *Interference*. Applying this standard, we hold that the Times review is not actionable in defamation.

First, the Times review stated that:

> *[Moldea] revives the discredited notion that Carroll Rosenbloom, the ornery owner of the Rams, who had a penchant for gambling, met foul play when he drowned in Florida 10 years ago.*

Moldea discusses Rosenbloom's drowning in pages 319 through 326 of his book, closing his account with quoted observations from several of Rosenbloom's friends, who speculate that he was murdered. *Interference* later reveals, on page 360, that Moldea has located previously unknown photographs, taken at Rosenbloom's autopsy, which make clear that he "died in a tragic accident and was not murdered." As we held in *Moldea (I)*, a reasonable jury could conclude that the Times review's characterization of *Interference's* portrayal of Rosenbloom's death was false, and that the reviewer's account of the book creates the misleading impression that Moldea inadequately investigated this story. *Moldea (I)*, 15 F.3d at 1147–48. However, given that *Interference* does not reveal that Rosenbloom's death was accidental until 35 pages after giving undeniably titillating hints of homicide, we cannot hold that a reviewer could not reasonably suggest that Moldea sought to "revive" the notion that Rosenbloom was murdered in order to build suspense before disproving that theory.

The second potentially actionable review passage states that:

> *Mr. Moldea tells as well of Mr. Namath's 'guaranteeing' a victory in Super Bowl III shortly after a sinister meeting in a bar with a member of the opposition, Lou Michaels, the Baltimore Colts' place-kicker. The truth is that the pair almost came to blows after they both had been drinking; and Mr. Namath's well-publicized 'guarantee' came about quite innocently at a Miami Touchdown Club dinner when a fan asked him if he thought the Jets had a chance. 'We'll win. I guarantee it,' Mr. Namath replied.*

Moldea (I) concluded that a reasonable jury could find that Moldea did not describe the meeting as a "sinister" rendezvous, but rather made clear that the meeting was "quite accidental and even confrontational." *Interference* at 197; *see Moldea (I)*, 15 F.3d at 1146–47. Even applying the "supportable interpretation" standard, this review passage is close to the line. *Interference* not only states that the Namath–Michaels meeting was "accidental," but on the same page quotes Michaels as saying "What we talked about had no relationship to the game," and quotes another player present at the meeting as confirming that " 'nothing technical' about the game was discussed." *Interference* at 197. The Times' petition for rehearing argues only that the review's characterization is supported by the fact that *Interference*'s description of the Namath–Michaels meeting appears in a chapter of the book largely devoted to probing allegations that there was something "suspicious" about Super Bowl III. *See* Petition for Rehearing at 12 (citing *Interference* at 197).

We are troubled by the "sinister meeting" passage, but are constrained to conclude that it does not give rise to an actionable claim. The review offered at least six observations to support the charge of "sloppy journalism": the five challenged passages, plus the unchallenged claim that Moldea made several spelling errors. At least five of these observations could not be proved false at trial, either because they are true, are supported opinion, are reasonable interpretations, or are not challenged in this suit. Moldea is left with only the "sinister meeting" passage as a possible basis for his defamation claim, and this is a very weak basis indeed. For

one thing, the "sinister meeting" passage is not defamatory on its face, but rather is simply one of the "interpretations" offered in support of the review's assessment of Moldea's book. Furthermore, even without the support of the "sinister meeting" passage, the review's assertion that *Interference* is marred by "too much sloppy journalism" is (as a legal matter) "substantially true," and so is not actionable in defamation.

As *Moldea (I)* noted, "substantial truth" is a defense to defamation. *Moldea (I)*, 15 F.3d at 1150. "Slight inaccuracies of expression are immaterial provided that the defamatory charge is true in substance." *Liberty Lobby v. Dow Jones*, 838 F.2d at 1296 (citing RESTATEMENT (SECOND) OF TORTS § 581A cmt. f (1977)); *accord Foretich v. CBS, Inc.*, 619 A.2d 48, 60 (D.C. 1993) (citing *Liberty Lobby v. Dow Jones*). The Supreme Court explained this defense in *Masson* by noting that: "Minor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge be justified." 111 S. Ct. at 2433 (interpreting California law) (internal quotation omitted); *accord Liberty Lobby v. Dow Jones*, 838 F.2d at 1296 (a statement is nonactionable if "[t]he sting of the charge . . . is substantially true."). The difficulty here is that, as *Moldea (I)* pointed out, this circuit rejected the so-called "incremental harm rule" in *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1568 (D.C. Cir. 1984), *vacated on other grounds*, 477 U.S. 242 (1986). *See Moldea (I)*, 15 F.3d at 1149–50. Application of the "substantial truth" test when "incremental harm" is not tolerated can be conceptually confusing. However, on reconsidering the instant dispute, we believe *Moldea (I)* read this court's rejection of the incremental harm rule much too broadly, and that *Anderson's* proscription is not applicable in this case.

Liberty Lobby v. Anderson rejected the defendants' claim that the plaintiffs in that case were "libel-proof" because "unchallenged portions of [defendants'] articles attribute[d] to the [plaintiffs] characteristics so much worse than those attributed in the challenged portions, that the latter could not conceivably do any incremental damage." 746 F.2d at 1568. Then–Judge Scalia observed that:

> The law, however, proceeds upon the optimistic premise that there is a little bit of good in all of us—or perhaps upon the pessimistic assumption that no matter how bad someone is, he can always be worse. It is shameful that Benedict Arnold was a traitor; but he was not a shoplifter to boot, and one should not be able to make that charge while knowing its falsity with impunity."

Id. However, the opinion goes on to note that:

> There may be validity to the proposition that at some point the erroneous attribution of incremental evidence of a character flaw of a particular type which is in any event amply established by the facts is not derogatory. If, for example, an individual is said to have been convicted of 35 burglaries, when the correct number is 34, it is not likely that the statement is actionable. That is so, however, not because the object of the remarks is "libel-proof," but because, since the essentially derogatory implication of the statement ("he is an habitual burglar") is correct, he has not been libeled.

Id. at 1568–69 n.6. This latter point is dispositive of the instant case.

The disputed "sinister meeting" passage in the Times review is not inherently defamatory—*i.e.*, it is not like calling Benedict Arnold a "traitor" *and* a "shoplifter," to cite the example used in *Anderson*. Rather, the discussion of the "sinister meeting" is but one of several interpretations of the book offered to support the claim of "sloppy journalism." As such, it does not come within the compass of "incremental harm." Because the review relies principally on statements that are true, supported opinions or supportable interpretations to justify the "sloppy journalism" assessment, we are constrained to find that it is substantially true and therefore not actionable.

III. Incidental Issues

Because we uphold the District Court's grant of summary judgment for the Times on Moldea's defamation claim, Mol-

dea's related claim for false light invasion of privacy must also fail. As we noted in *Moldea (I)*, "a plaintiff may not avoid the strictures of the burdens of proof associated with defamation by resorting to a claim of false light invasion." *Moldea (I)*, 15 F.3d at 1151 (citing *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513, 2519 (1991); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988)). Similarly, our resolution of Moldea's defamation claim requires that we uphold the District Court's denial of permission to amend the Complaint in the instant case. *See Moldea v. New York Times Co.*, 793 F. Supp. 338 (D.D.C. 1992). Appellant sought to add four causes of action to his Complaint, based upon the Supreme Court's decision in *Cohen v. Cowles Media Co.* In light of our resolution of Moldea's libel claim, we agree with the trial court's assessment that the amended Complaint could not withstand a motion to dismiss, and so would be futile. As *Cohen* itself held, a plaintiff may not use related causes of action to avoid the constitutional requisites of a defamation claim. *See Cohen*, 111 S. Ct. at 2519.

IV. Conclusion

Moldea has made a number of allegations in this suit that Gerald Eskenazi's negative review of *Interference* was prompted in part by Eskenazi's allegiance to the National Football League ("NFL"). Moldea alleged in his original brief to this court that Eskenazi has covered the NFL as a correspondent for over thirty years, and that he was therefore biased against *Interference* because he was dependent on the league's goodwill in order to gain access to information necessary to report on its activities. *See* Brief for Appellant at 8–9. Indeed, Moldea's book predicts that the NFL's "loyal sportswriters" will try to discredit *Interference*. *See Interference* at 25. Even if true, however, these allegations do not make a case for appellant.

Any intelligent reviewer knows at some level that a bad review may injure the author of the book which is its subject. Indeed, some bad reviews may be written with an aim to damage a writer's reputation. There is nothing that we can

do about this, at least not without unacceptably interfering with free speech. There simply is no viable way to distinguish between reviews written by those who honestly believe a book is bad, and those prompted solely by mischievous intent. To allow a plaintiff to base a lawsuit on claims of mischief, without some indication that the review's interpretations are unsupportable, would wreak havoc on the law of defamation. *See McBride v. Merrell Dow & Pharmaceuticals, Inc.*, 717 F.2d 1460, 1466 (D.C. Cir. 1983) ("Libel suits, if not carefully handled, can threaten journalistic independence. Even if many actions fail, the risks and high costs of litigation may lead to undesirable forms of self-censorship.").

"As James Madison pointed out in the Report on the Virginia Resolutions of 1798: 'Some degree of abuse is inseparable from the proper use of everything; and in no instance is that more true than in that of the press.' " *Gertz*, 418 U.S. at 340. We are not insensitive to the fact that the "supportable interpretation" rule may permit some malicious reviews to go unchecked; however, "[b]ecause an *ad hoc* resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application." *Id.* at 343–44.

This is a difficult case, and we can easily understand the frustrations that have prompted Mr. Moldea's long legal battle. Upon reconsideration, however, we find that our first opinion in this case was misguided. Accordingly, we modify that opinion as indicated herein, and affirm the grant of summary judgment in favor of appellee New York Times Company.

So ordered.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 92-7065 **SEPTEMBER TERM, 1993**
USDC CV 90-02053

Dan E. Moldea,

Appellant

v.

New York Times Company

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: **Mikva**, Chief Judge; **Wald** and **Edwards**, Circuit Judges

J U D G M E N T

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED**, by the Court, that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY:
Robert A. Bonner
Deputy Clerk

Date: May 3, 1994
Opinion for the Court filed by Circuit Judge Edwards.

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CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the foregoing Petition for Writ of Certiorari of Dan E. Moldea were mailed via Federal Express to:

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Supreme Court, U.S.
FILED
SEP 1 1994
OFFICE OF THE CLERK

No. 94-192

IN THE

Supreme Court of the United States

October Term, 1994

DAN E. MOLDEA,

Petitioner,

v.

THE NEW YORK TIMES COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Can evaluative, subjective statements of literary criticism be actionable — consistent with the First Amendment — when those statements contain no provably false facts and are fully supported by the critiqued work?

Does the rule of *Milkovich v. Lorain Journal Company*, 497 U.S. 1 (1990), require a reviewing court to ignore the context of language in assessing whether that language is verifiable?

PARTIES TO THE PROCEEDINGS

Respondent The New York Times Company has no parent company and no publicly traded affiliates or subsidiaries.

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No. 94-192

IN THE

Supreme Court of the United States

October Term, 1994

DAN E. MOLDEA,

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v.

THE NEW YORK TIMES COMPANY,

Respondent.

BRIEF IN OPPOSITION

Respondent The New York Times Company ("*The Times*"), publisher of *The New York Times*, respectfully prays that the instant Petition be denied. The unanimous decision below reflects nothing more than the unremarkable application of centuries of common sense and common law. This accumulated wisdom prohibits recovery of damages for defamation based upon nonverifiable interpretations of a literary work, particularly when those interpretations appear — as here — in a book review. There is no conflict in the Circuits regarding this principle. There is no special or important reason to grant the Petition under Supreme Court Rule 10. The Petition should be denied.

STATEMENT OF THE CASE

This lawsuit for libel and invasion of privacy arises from a book review ("the Review") written about Petitioner's book, *Interference: How Organized Crime Influences Professional Football* ("*Interference*"), and published in the Book Review section of *The New York Times* on September 3, 1989.

The Review, authored by veteran sportswriter Gerald Eskenazi, offered some positive comments about *Interference*, including the assessment that "there is some really hot stuff in here," but concluded that despite its strengths, *Interference* was marred by "too much sloppy journalism to trust the bulk of this book's 512 pages — including its whopping 64 pages of notes." *See* Review.[1] Eskenazi supported his opinion with illustrations from the book, including Moldea's misspelling of the names of prominent sports figures and his mischaracterization of certain people and events in football lore.[2]

Nearly a year later, Moldea sued *The Times*, disputing the Review's conclusion and quarreling with its examples. After preliminary discovery, *The Times* moved for summary judgment based solely on the language of the Review and the book. The district court (per Chief Judge John Garrett Penn) granted *The Times*' motion, finding that the Review's conclusion of "too much sloppy journalism" was "an unverifiable opinion," and that each example used in the Review was "either a supported statement of fact or a nonverifiable opinion . . . ." *Moldea v. New York Times Co.*, 793 F. Supp. 335, 337 n.3 (D.D.C. 1992).

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1. The Review is reproduced in its entirety in *Moldea v. New York Times Co.*, 15 F.3d 1137, 1151-52 (D.C. Cir. 1994) ("*Moldea I*") (appendix); *Interference* was lodged by Petitioner.

2. Other book reviews critiqued *Interference* far more harshly than *The Times*. *See, e.g.*, Frank Fitzpatrick, *Looking for ties between football, gambling and the mob*, THE PHILADELPHIA INQUIRER, Sept. 3, 1989, at 4J ("The germ of a compelling story is there, but in Moldea's hands the germ grew into a virus. As a result, Moldea has created little more than a litany of circumstantial evidence, citing countless examples of organized-crime figures' connections with the NFL. Those looking for a smoking gun will be sadly disappointed, perhaps as disappointed as those with an appreciation for good writing."); Sandy Smith, *The NFL and the Mob: Who Calls the Plays?*, THE WASHINGTON POST, Oct. 29, 1989, Book World at 6 ("Moldea dug deep, but sad to say, he came up short. Actual evidence is scant in his book. He does, however, manage to package the fog of suspicions, rumors, allegations and accusations that have enveloped pro football over the years . . . ."); Desiree Ward, *Don't let this interfere*, THE MILWAUKEE JOURNAL, Aug. 31, 1989 ("Don't buy this book. Don't borrow this book. Don't swap anything for this book. If it's too late and one of the above has already taken place, put the book down and don't read it.").

Petitioner appealed. Circuit Judge Harry T. Edwards, joined by Circuit Judge Patricia A. Wald, reversed the district court's grant of summary judgment. Chief Judge Abner J. Mikva dissented. *See Moldea v. New York Times Co.*, 15 F.3d 1137 (D.C. Cir. 1994) ("*Moldea I*"). The court examined the "focal point" of the Review — that *Interference* contains "too much sloppy journalism" — and concluded that it could be held nonactionable only if it were supported by true facts. *Id.* at 1141, 1146. The court found that "[s]ome of the factual evidence with which *The Times* review supports its assertion that *Interference* is 'sloppy' is plainly true," including that: (1) the book contains "warmed over" material; (2) a key fact is buried in a footnote; and (3) the names of several prominent sports figures are misspelled. *Id.* at 1148-49. Of the remaining examples challenged by Petitioner, the court found one to be a supported statement of opinion, but two to be actionable, verifiable statements of fact. *Id.* at 1146-49.

Despite its finding that only two of the six examples supporting the "sloppy journalism" assessment could be found by a jury to be false, and its recognition that three of the examples were true and one was supported opinion, *id.* at 1146-49, the divided panel reversed and remanded the case to the trial court with instructions to consider the substantial truth of the Review.

The two statements that the *Moldea I* court remanded to the trial court — which form the basis for the instant Petition — were the reviewer's subjective interpretations of two passages in *Interference*. The first of the two interpretations stated that Moldea "revives the discredited notion that Carroll Rosenbloom, the ornery owner of the Rams, who had a pen-

chant for gambling, met foul play when he drowned in Florida 10 years ago." *See* Review. This characterization was based on the text of *Interference*, which, for over 35 pages, repeatedly dredged up old rumors and innuendo about Rosenbloom's death[3] before issuing the decidedly tentative one-line statement that: "In short, the evidence *appears to be* clear that Rosenbloom died in a tragic accident and was not murdered." *Interference* at 360 (emphasis added). The other interpretation still at issue after *Moldea I* concerned a meeting described in *Interference* as "suspicious" and in the Review as "sinister":

> Mr. Moldea tells as well of Mr. Namath's "guaranteeing" a victory in Super Bowl III shortly after a sinister meeting in a bar with a member of the opposition, Lou Michaels, the Baltimore Colts' place-kicker. The truth is that the pair almost came to blows after they both had been drinking; and Mr. Namath's well-publicized "guarantee" came about quite innocently at a Miami Touchdown Club dinner when a fan asked him if he thought the Jets had a chance. "We'll win. I guarantee it," Mr. Namath replied.

See Review. This portion of the Review — like the "revives"

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3. *See, e.g.*, *Interference* at 324 ("In the wake of Rosenbloom's funeral, numerous questions arose about the circumstances of his death, which have challenged the contention that he drowned by accident. It was suggested by some that Rosenbloom might have been murdered."; "Could Rosenbloom's death have been anything but an accidental drowning? If it was not, there was a whole cast of characters who would have had the means, opportunity and motive."); *id.* at 325 ("Nevertheless, the rumors of foul play persisted."); *id.* at 358 ("The PBS report also raised questions about the investigation of the accidental drowning of Carroll Rosenbloom, suggesting he might have been murdered.").

language — was fully supported by the text of *Interference*.[4] Nonetheless, the *Moldea I* court concluded that the reviewer's interpretation of the Rosenbloom and Namath-Michaels passages of the book could be actionable.

On reconsideration, Judge Edwards, joined by Judges Wald and Mikva, modified *Moldea I* and affirmed the district court's grant of summary judgment in favor of *The Times*. *Moldea v. New York Times Co.*, 22 F.3d 310 (D.C. Cir. 1994) ("*Moldea II*").[5] The court affirmed its earlier findings regarding the three non-actionable examples. *Id.* at 312, 317. It then turned to the remaining two examples, noting that "[t]he key to this case is the question of verifiability." *Id.* at 317. The court found that "given that *Interference* does not reveal that Rosenbloom's death was accidental until 35 pages after giving undeniably titillating hints of homicide. we cannot hold that a reviewer could not reasonably suggest that Moldea sought to 'revive' the notion that Rosenbloom was murdered in order to build suspense be-

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4. The use of the word "sinister" in the Review as a shorthand way to describe the book's treatment of the Namath-Michaels barroom encounter is a fair interpretation of *Interference*. Moldea writes "For years, there have been questions as to whether Super Bowl III was fixed," and follows up this startling statement with a long discussion about Michaels' teammate, Bubba Smith, who claimed that he heard the game had been "set up." *Interference* at 193. After planting the seeds of suspicion, Moldea cultivates them with his portrayal of the Namath-Michaels meeting. "Those who still insist that something about the game was *suspicious* call attention to a meeting between Joe Namath and Lou Michaels . . . ." *Id.* at 197 (emphasis added). He repeatedly refers to Michaels' drinking throughout the evening and makes a point of noting that Namath paid for Michaels' drinks and drove Michaels and a teammate back to their hotel. Thus, the use of the word "sinister" to describe the meeting is supported by the insidious implication laced throughout the passage that an inebriated Michaels made indiscreet statements about the Colts' strength as a team. This implication is buttressed by the insertion of a quote from Michaels himself, who, when asked if he had tipped Namath off to the Colts' defense, issues a sheepish and weak non-denial — "I don't think it's likely . . . ." *Id.* at 198. The passage concludes with a well placed, suggestive link between the meeting and Namath's famous guarantee of victory: "[s]oon after the incident between Namath and Michaels took place, Namath came out publicly and guaranteed the game." *Id.* at 197.

5. Petitioner erroneously states that *Moldea II* reversed *Moldea I* (Petition at 2). In fact, the *Moldea II* court modified the earlier decision. *Moldea II* at 320.

fore disproving that theory." *Moldea II* at 318. Similarly, the court found that the "sinister meeting" language was "simply one of the 'interpretations' offered in support of the review's" central theme and, in any event, was not defamatory on its face. *Id.* at 318. Noting that "Moldea [was] left with only the 'sinister meeting' passage as a possible basis for his defamation claim, and this is a very weak basis indeed," the court concluded: "Because the review relies principally on statements that are true, supported opinions or supportable interpretations to justify the 'sloppy journalism' assessment, we are constrained to find that it is substantially true and therefore not actionable." *Id.* at 318-19.[6]

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6. Petitioner makes much of an amicus brief supposedly "filed" by media organizations in *Moldea II*, but neglects to inform this Court that the motion of amici for leave to file the brief was *denied*. *See* Petition at 25; Order (D.C. Cir. May 2, 1994). He also fails to mention that the court rejected a second amicus effort, submitted not by "the media," but by the Association of American Publishers, Inc. and PEN American Center. Those organizations represent the very publishers and authors whose works are subjected to critical review. Other inaccuracies and omissions in the Petition abound:

- The Review's credit line was not "misleading" (Petition at 6). Eskenazi is a sportswriter who covers baseball. He has also covered professional football, a fact he discloses in the Review itself when he describes himself, tongue-in-cheek, as one of the "loyal sportswriters" whom Moldea believes the NFL will "trot out" to criticize *Interference*.
- *The Times* did not violate any policy or practice by declining to print Moldea's rants about Eskenazi and the Review (Petition at 11). *The Times* is not obligated to publish every letter from a disgruntled author unhappy with a Times review, particularly when the letter is marred by the same fundamental problems that beset the book.
- *The Times* has never "conceded" the issue of actual malice for the purpose of summary judgment or for any other purpose (Petition at 39 n.6). It was unnecessary for the *Moldea II* court to reach the issue of actual malice because *The Times*' dispositive motion was based solely on the language of *Interference* and the Review.
- Petitioner claims that "[s]ales were moving briskly" prior to the Review, and that the impact of the Review was "devastating" (Petition at 8, 10). The only week in which sales of the book were arguably "brisk" was the week ending July 7, 1989. Initial discovery suggests that sales by the publisher apparently plummeted throughout the rest of the summer and then *rose* in the week *following* the Book Review.

REASONS FOR DENYING THE WRIT

THE DECISION IS CONSISTENT WITH SUPREME COURT PRECEDENT AND CENTURIES OF JURISPRUDENCE PROTECTING LITERARY CRITICISM.

Though Petitioner claims that this is "one of the most, if not the most, closely watched libel cases in recent history," its dismissal would have passed virtually unnoticed had it not been for the appellate court's aberrant ruling in *Moldea I*. That ruling has been self-corrected through reconsideration, and this case now is relegated to its proper place among the legion of other failed libel cases arising out of critical commentary.[7] This result is entirely consistent with both our Anglo-American and constitutional preferences for encouraging rather than stifling pointed criticism. *See, e.g., Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984). As one justice on the King's Bench recognized nearly two centuries ago: "Liberty of criticism must be allowed, or we should have neither purity of taste nor of morals." *Tabart v. Tipper*, 170 Eng. Rep. 981, 982 (K.B. 1808).

A. The Lower Court Properly Applied The Law Governing Subjective Interpretations Of Literary Works.

1. The decision reflects a rich cultural and legal heritage that affords breathing space for criticism of literary works.

"There is a long and rich history in our cultural and legal traditions of affording reviewers latitude to comment on literary and other works." *Moldea II* at 315. The value of this commentary, according to the renowned British poet and critic Matthew Arnold, is that it "tends to establish an order of ideas, if not absolutely true, yet true by comparison with that which it displaces; to make the best ideas prevail." Matthew Arnold, *The Function of Criticism at the Present*

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7. This case represents a very small slice of defamation law, and an even smaller slice of "fact v. opinion" jurisprudence — the meaning of two supporting statements in a work of literary criticism. It is hardly the avatar of modern libel law that Petitioner fancies.

Time, *in* ESSAYS IN CRITICISM 6 (1865); *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) ("right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection") (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)). This belief in the corrective value of the "marketplace of ideas" found expression across the Atlantic through the oft-quoted dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting): "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution." *Moldea II*, like the collective body of law and logic before it, recognizes that arguments about differing interpretations of a book are best resolved through an exchange of ideas, not subpoenas.

The court in *Moldea II* acknowledged the inherently subjective nature of criticism — particularly criticism that involves the interpretation of literature and art — by holding that such commentary is actionable "only when the interpretations are *unsupportable by reference to the written work*." *Moldea II* at 315 (emphasis in original). This common sense approach harkens back to language penned by this Court over twenty years ago in *Time, Inc. v. Pape*, 401 U.S. 279 (1971). In *Pape*, the Court reversed a libel judgment based on a magazine article about a government report, finding that the article was more descriptive in nature than a "direct account of events that speak for themselves." 401 U.S. at 285. As this Court later observed, the decision recognized "the difficult choices that confront an author who departs from direct quotation and offers his own interpretation of an ambiguous source." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 519 (1991); *accord Bose Corp.*, 466 U.S. at 512-13 (refusing to permit recovery for choice of language which, "though reflecting a misconception," was "one of a number of possible rational interpretations" of ambiguous event).[8] The Court explained that "[t]he protection for rational interpretation

8. A book review presents an even stronger basis for protection of interpretations than the article in *Pape*. A reader is more likely to view a critic's interpretation of a book as a subjective assessment than a journalist's description of a government report.

serves First Amendment principles by allowing an author . . . interpretive license . . . ." *Masson*, 501 U.S. at 519 (discussing *Bose*).[9]

Although this Court repeatedly has declined to wade into battles over literary interpretation, it has not granted — nor does the decision reflect — categorical immunity for critics.[10] The court below warned, for instance, "that a critic's interpretation must be rationally supportable by reference to the actual text he or she is evaluating, and thus would not immunize situations . . . in which a writer launches a personal attack, rather than interpreting a book." *Moldea II* at 315. Accordingly, the review would not have been protected if it had "stated or implied that *Interference* was a badly written book because its author was a drug dealer." *Id.* Furthermore, contrary to Petitioner's alarmist rhetoric, the standard of *Bose*, *Pape*, and now *Moldea II*, is limited to subjective interpretations of ambiguous materials.

Petitioner attempts to distinguish *Bose* and *Pape* by arguing that "there is no ambiguity concerning the text of *Interfer-*

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9. By providing room for rational interpretation and interpretive license in commentary, the decision below tracks two important common law antecedents. Courts, including the *Moldea* court, have long afforded protection to so-called "pure" opinion, *i.e.*, opinions based on stated facts. *See, e.g.*, *Moldea I* at 1144-45 ("Because the reader understands that such supported opinions represent the writer's interpretation of the facts presented, and because the reader is free to draw his or her own conclusions based upon those facts, this type of statement is not actionable in defamation."). The law of fair comment also protects assessments based on stated facts, and even insulates comments based on *un*stated facts when those facts are publicly available. *See, e.g.*, *Milkovich*, 497 U.S. at 13; *Fisher v. Washington Post Co.*, 212 A.2d 335, 338 (D.C. 1965). In *Fisher*, the court applied the privilege to an art critic's statements that pictures in plaintiff's gallery were "badly hung" and included many "commercial paintings." *Id.* at 337. The court reasoned that the "facts upon which [the critic] based her conclusions were readily accessible to any who wanted to test them," *id.* at 338, just as *Interference* remains readily accessible to anyone who wants to read it.

10. No one doubts that a book review can be actionable. The lower court was correct — and the Times has never disputed — that a book review has no automatic immunity from libel suits and that a false, verifiable fact, even in a review, can be actionable. However, "[a]s a general principle, authors, journalists, and artists invite criticism of their work product, and . . . the mainstream position is clearly to construe such criticism as opinion or fair comment." RODNEY A. SMOLLA, LAW OF DEFAMATION § 6.12[7] (1994).

ence" (Petition at 48). The book shows otherwise. The two examples addressed by the court in *Moldea II* — the Rosenbloom and Namath-Michaels passages — are patently ambiguous, providing just enough grist for the reader to reach the darkest conclusions. As the court explained, "Moldea discusses Rosenbloom's drowning in pages 319 through 326 of his book, closing his account with quoted observations from several of Rosenbloom's friends, who speculate that he was murdered." *Moldea II* at 318. The court emphasized that Moldea did not reach his tentative assessment that Rosenbloom's death was accidental until page 360. *Id.* Based on this belated explanation of the "undeniably titillating hints of homicide," the court found that a reviewer could reasonably "suggest that Moldea sought to 'revive' the notion that Rosenbloom was murdered in order to build suspense before disproving that theory." *Id.* At the very least, this lengthy and ambiguous passage — whatever it may mean — is sufficient to denominate the issue as having been "revived." One common understanding of the word "revive" is to "bring back" or "renew in the mind or memory." *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1984). The text describing the Namath-Michaels barroom encounter is no clearer. *See supra* note 4.

Petitioner's fundamental error lies not in concluding that the Review's characterization of the Rosenbloom and Namath passages was wrong; it is in presuming that there is any right — or, to use the language of *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), "verifiable" — interpretation of those turbid passages. To declare, as Petitioner does, that the text of *Interference* — some 512 pages — contains "no ambiguity," is to create a standard of book writing (and smugness) that even our most accomplished authors could never meet. Nor would they want to. The beauty of language, particularly literary prose, is that it affects readers in different ways, and no one holds a monopoly on its meaning or interpretation. Not even its author.

2. The lower court was mindful of this Court's decision in *Milkovich* and the proper role of context in assessing verifiability of language.

Contrary to Petitioner's claims that the lower court eschewed the teachings of *Milkovich*, the *Moldea II* court makes clear that it was firmly guided by Chief Justice Rehnquist's opinion in that case. In decidedly *un*ambiguous terms, the court defined its task as "determin[ing] as a threshold matter whether a challenged statement . . . is verifiable — that is, whether a plaintiff can prove that it is false. . . . *The key to this case is the question of verifiability.*" *Moldea II* at 316-17 (citation omitted) (emphasis added).

The court's unequivocal mission statement parallels the language and spirit of *Milkovich*. In *Milkovich*, a high school wrestling coach claimed that an Ohio newspaper defamed him in a sports column by implying that he had perjured himself in a state court proceeding. The newspaper argued that the challenged statements constituted the author's opinion and therefore could not be actionable. Unpersuaded that "an additional separate constitutional privilege for 'opinion' [was] required" to augment existing First Amendment safeguards, *id.* at 21, the Court refused to craft a "wholesale defamation exemption for anything that might be labeled 'opinion.'" *Id.* at 18. Building on a long line of cases, including *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), the Court reaffirmed that "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will [still] receive full constitutional protection." *Milkovich*, 497 U.S. at 20.

Faithfully applying these principles, the *Moldea II* decision analyzed the verifiability of the challenged passages and concluded that they were incapable of being proved false. Much like his approach to challenging the Review itself, Petitioner does not like the conclusion, so he quibbles with the analysis. He claims that the lower court improperly substituted its own "supportable interpretation" standard for the verifiability test of *Milkovich* (Petition at 35), and, in so doing, allowed the context of the challenged statements to "trump" the verifiability requirement (*id.* at 36). Neither claim has merit.

Moldea II did not "create" the supportable interpretation standard, as Petitioner suggests (Petition at 35), but borrowed it from a number of well-reasoned decisions of this Court. *See* discussion of *Bose* and *Pape*, *supra*. Moreover, the supportable interpretation standard never eclipses the verifiability test in *Moldea II*; it serves only as a worthy complement — a kind of modern-day sextant to help navigate the sargasso sea of literary interpretation. As the court recognized in discussing the standard, "some materials by their very nature require interpretation, and . . . the First Amendment affords latitude to those engaged in that task." *Moldea II* at 316; *see also Bose*, 466 U.S. at 513 ("the difference between hearing violin sounds move around the room and hearing them wander back and forth fits easily within the breathing space that gives life to the First Amendment"). Even as it struggled with the meaning of language and looked to *Bose* and *Pape* for guidance, the court did so squarely within the contours of what it described as the "key to th[e] case": the "question of verifiability" under *Milkovich*. *Moldea II* at 317.[11]

As with all tests that grapple with the meaning of language, however, the verifiability test recognizes that language cannot be analyzed in a vacuum. A "fundamental principle of . . . language itself [is] that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v. United States*, 113 S. Ct. 1993, 1996 (1993); *cf. Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 1178 (1994) (analysis of parody under Copyright Act turns in part on contextual distinction between "[b]iting criticism [that merely] suppresses demand [and] copyright infringement[, which] usurps it."). Mindful of this basic precept, the court below correctly concluded that the *Milkovich* decision does not "abandon[ ] the principle of looking to the context in which speech appears," *Moldea II* at 314, and

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11. In light of the fundamental ambiguity in *Interference*, the court's invocation of the supportable interpretation standard to assist in its verifiability analysis is particularly appropriate. Where a writing "is so ambiguous as this one was, it is hard to imagine a test of 'truth' that would not put the publisher virtually at the mercy of the unguided discretion of a jury." *Pape*, 401 U.S. at 291.

noted this Court's direction that "the general tenor" of the article be evaluated. *Id.* at 313 n.2 (citing *Milkovich*, 497 U.S. at 21).[12]

Thus, in *Masson*, this Court reasoned that the accuracy of quotations could not be determined without reference to context, because "an exact quotation out of context can distort meaning, although the speaker did use each reported word." *Masson*, 501 U.S. at 515. The contextually bound test for inaccurate quotations — like the verifiability test — necessarily rests upon "the meaning a statement conveys to a reasonable reader." *Masson*, 501 U.S. at 515 (any test for quotations that ignored this bedrock principle would be "a departure from the underlying purposes of the tort of libel as understood since the latter half of the 16th century"). The Court found that the contextual factors that "would, or at least could, lead a reader to take the quotations at face value" include the fact that the "work purports to be nonfiction, the result of numerous interviews," and the fact that the *New Yorker* magazine "enjoy[ed] a reputation for scrupulous factual accuracy." *Id.* at 513.[13] If these factors influence the meaning attributed to quotations, then surely the subjective

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12. Interestingly, the *Milkovich* Court itself looked to "tenor and context" in evaluating language. In concluding that the famous "false idea" passage from *Gertz* was not intended to create a wholesale exemption for opinion, the Court noted, *inter alia*, that "such an interpretation [would] be contrary to the tenor and context of the [*Gertz*] passage . . . ." *Milkovich*, 497 U.S. at 18 (construing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974)).

13. So-called "rhetorical hyperbole" cases, exemplified by the *Letter Carriers* and *Bresler* decisions reaffirmed by this Court in *Milkovich*, lend further support to the view that language must be understood in context. In *Letter Carriers* and *Bresler*, this Court relied in part on context to find that the terms "scab" and "blackmail" could not reasonably be understood as statements of fact in the respective contexts of a labor strike and a political dispute. *See Moldea II* at 314 ("it is in part the *settings* of the speech in question that makes their hyperbolic nature apparent"); *NBC Subsidiary (KCNC-TV), Inc. v. Living Will Ctr.*, 1994 Colo. LEXIS 527, at *15 (July 11, 1994) ("In each of those decisions [*Bresler-Letter Carriers-Falwell*], the court expressly considered the statements as a whole, as well as the broader social context in which they arose.").

nature of a book review must bear on the meaning attributed to literary criticism.[14]

Milkovich does not hold otherwise. As the *Moldea II* court explained, context presumably played no part in the outcome of *Milkovich* because the challenged language — the accusation of perjury — was a clear statement of verifiable fact irrespective of its context:

> Although the statements at issue in *Milkovich* appeared in an 'opinion column' in a newspaper sports section, the Court found no relevance in this fact in reaching its decision, apparently because an accusation of perjury is not the sort of discourse that even arguably is the usual province of such columns.

Moldea II at 313. In essence, context in *Milkovich* made little or no difference to the verifiability analysis because the inescapably factual nature of a perjury charge is not the usual stuff of sports columns. By contrast, this case involves the subjective evaluation of a literary work susceptible to varying interpretations, and a context in which "the allegedly libelous statements were evaluations quintessentially of a type readers expect to

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14. This Court's falsity analysis in *Masson* repeatedly refers to the context of both the source material and the quotations drawn from that material. *See Masson*, 501 U.S. at 524 ("Petitioner's other tape-recorded remarks did indicate that he and another analyst planned to have great parties at the Freud house and, *in a context that may not even refer to Freud house activities*, to 'pass women on to each other.' ") ("any difference between petitioner's tape-recorded statement . . . and the quotation . . . is, *in context*, immaterial") (emphasis added).

find in that genre." *Moldea II* at 315.[15] Thus, "*Milkovich* . . . simply 'discounted [context] in the circumstances of that case,' " *Moldea II* at 314 (quoting *Phantom Touring*[16]), circumstances that are not present here.

Nor could the rule be otherwise. Assessing the meaning of language is an inexact science, and divorcing language from its context would make the task infinitely more difficult. As Justice Holmes observed long ago: "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

B. There Is No Conflict In The Circuits Regarding The Role Of Context In Assessing The Verifiability Of Language.

1. Courts uniformly examine language in context when determining verifiability.

Contrary to Petitioner's assertion, *Milkovich* has been applied uniformly by the lower courts. Courts have resoundingly rejected the analysis-by-classification approach, and instead focused squarely on verifiability. The Seventh Circuit's Chief

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15. Indeed, Eskenazi's review contains the type of criticism commonly found in book reviews. Eskenazi's criticisms are not unlike those contained in Michael Dirda's 1993 Pulitzer Prize winning review of Daniel J. Boorstin's *The Creators*:

> For the chief problem with *The Creators* lies in the superficiality of its approach to art. Boorstin delivers the received opinion on most works, makes enough mistakes to suggest that he has not read the literary texts recently or attentively, misquotes frequently, cites passages that do not support what he claims . . . .
>
> MISTAKES? *The Creators* is pockmarked with distracting errors of spelling and fact that reveal at the least lack of attention on the part of the author and his editors.

Michael Dirda, *Culture's Greatest Hits*, THE WASHINGTON POST, Oct. 4, 1992, Book World at 5.

16. *See Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724 (1st Cir.), *cert. denied*, 112 S. Ct. 2942 (1992).

Judge, Richard Posner, recently capsulized the implicit role of context in these cases: "[I]f it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable." *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993).

The First Circuit has reached virtually the same conclusion. In *Phantom Touring*, the court found an article describing a theatrical production as a "rip-off, a fraud, a scandal, [and] a snake-oil job" to be "figurative and hyperbolic" commentary, reasoning that "no objective evidence [could] disprove" the statements. The court emphasized *Milkovich*'s protection for statements that "cannot 'reasonably [be] interpreted as stating actual facts' about an individual," and illustrated the *Milkovich* logic with an example apt to the present case: "Thus, a statement such as, 'That's the worst play I've ever seen,' would be protected not because it is labeled an opinion but because it is so subjective that it is not 'susceptible of being proved true or false.' " *Id.* at 727 (citation omitted). Several facts precluded a finding of verifiability, including the fact that the challenged statements appeared in a theater column, "a type of article generally known to contain more opinionated writing than the typical news report." *Id.* at 729.

Other courts carrying out the delicate task of evaluating the meaning of language also have not hesitated to consider context as an aid in determining verifiability. *See, e.g., Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1096 (4th Cir. 1993) ("in context, 'bottom line' . . . connotes 'cutting to the chase,' not an accounting conclusion"); *Gehl Group v. Koby*, 838 F. Supp. 1409, 1416-17 (D. Colo. 1993) (statement charging that the Fraternal Order of Police consists of "the prostitutes of the law enforcement profession" not actionable when construed in context); *Don King Prods., Inc. v. Douglas*, 742 F. Supp. 778, 783 (S.D.N.Y. 1990) (rejecting construction that "divorces the remarks from the context in which they were uttered, and, in the process, badly distorts their semantic content"); *Dworkin v. L.F.P., Inc.*, 839 P.2d

903, 915-16 (Wyo. 1992); *Diez v. Pearson*, 834 S.W.2d 250, 252 (Mo. Ct. App. 1992). Far from the renegade decision painted by Petitioner, the *Moldea II* opinion fits comfortably within this uniform landscape of cases.

2. Even the cases cited by Petitioner considered context as part of the verifiability analysis.

Neither of the cases cited by Petitioner to support his alleged "split" in the Circuits rejected the consideration of context as part of the verifiability analysis. *See Unelko Corp. v. Rooney*, 912 F.2d 1049 (9th Cir. 1990), *cert. denied*, 499 U.S. 961 (1991); *Kolegas v. Heftel Broadcasting Corp.*, 607 N.E.2d 201 (Ill. 1992). In *Rooney*, the factual statement that a windshield treatment " 'didn't work' . . . produce[d] the impression that [television commentator Andy] Rooney [was] maintaining that Rain-X failed to perform as guaranteed, the context of his broadcast notwithstanding." 912 F.2d at 1054. Context was a factor, but — just like the "general tenor" of the column in *Milkovich* — it failed to negate the impression left by the speaker.[17] The Ninth Circuit concluded that whether the product "worked" or not was readily verifiable (like an accusation of perjury), but the case was dismissed because plaintiff had failed to prove that Rain-X worked. *Rooney*, 912 F.2d at 1057.

The Supreme Court of Illinois in *Kolegas*, like the Ninth Circuit in *Rooney*, also looked to context as one consideration among many in its verifiability analysis. There, plaintiff hired a Chicago radio station to advertise a classic cartoon festival that he produced as a benefit for Elephant Man's disease. Plaintiff called the station shortly after the broadcast of one of his advertisements. During the ensuing on-air interview, plaintiff described the purpose of the benefit and provided information about the festival. When plaintiff claimed that his wife and son

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17. Contrary to Petitioner's representation that the *Rooney* court "refused to give weight to" context (Petition at 30), the Ninth Circuit explicitly stated: "In determining whether Rooney's statement is actionable, we 'examine the statement in its totality in the context in which it was uttered or published.' " *Rooney*, 912 F.2d at 1054.

had Elephant Man's disease, the disc jockey allegedly stated, "You're gone," and hung up on plaintiff. Additional on-air comments followed, including the statements that plaintiff was "not for real," that he was "scamming" the station, and that there was "no such show as the classic cartoon festival . . . ." *Kolegas*, 607 N.E.2d at 205.

The court found that "[t]hose statements *can* reasonably be construed as asserting facts; namely, that [plaintiff] was lying and that no festival would take place." *Id.* at 208. Rejecting the argument that the language was mere hyperbole, the court explained that the Supreme Court "has characterized language as 'rhetorical hyperbole' only when that language, in context, was obviously understood as an exaggeration, rather than a statement of literal fact." *Id.* The court then examined the context of the statements:

> those who heard the defamatory remarks may have been more likely to interpret those remarks literally or seriously, because the statements were made immediately after the advertisement promoting the festival was aired.

Id. at 209. These circumstances *supported* the finding that the statements "were obviously intended to be taken literally" despite the comical nature of the program. *Id.*

Thus, contrary to Petitioner's cramped reading of *Rooney* and *Kolegas*, neither case rejects the role of context in assessing verifiability, and neither case generates the so-called "split" in the Circuits that Petitioner imagines.[18]

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18. Of course, statements as to whether a product "lived up to its bottle's claims," *Rooney*, 912 F.2d at 1055, or whether a cartoon festival would take place, are vastly different from the personal evaluation of a book made by a reviewer applying his own standards and values.

C. This Court Should Not Review The Finding Of Substantial Truth.

Based on a misreading of *Moldea II*, Petitioner attempts to convert the court's run-of-the-mill application of the substantial truth doctrine into an unbridled exercise in "procedural non-neutrality." This transformation is more than *Moldea II* can bear. The *Moldea II* court found that the Review's conclusion that the book contained "too much sloppy journalism" was supported by "at least six observations" made in the Review: "the five challenged passages, plus the unchallenged claim that Moldea made several spelling errors." *Moldea II* at 318. As to these six observations, the court applied the *Milkovich* standard and determined that "[a]t least five of these [six] observations could not be proved false at trial, either because they are true, are supported opinion, are reasonable interpretations, or are not challenged . . . ." *Moldea II* at 318. With five of the six examples eliminated as potential fodder for a defamation suit, and the remaining example "not defamatory on its face," *id.* at 318, the court was compelled to the conclusion that "as a matter of law the review is substantially true." *Id.* at 313.

The court's conclusion comports with long-settled precedent. Libel claims should be dismissed if the challenged statements are substantially true, *i.e.*, if the "gist" or "sting" of the statements is correct. *See, e.g., Masson*, 501 U.S. at 517; *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1296 (D.C. Cir.), *cert. denied*, 488 U.S. 825 (1988). As this Court has explained, "Minor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.' " *Masson*, 501 U.S. at 517; *see also Hepps*, 475 U.S. at 778 ("We recognize that requiring the plaintiff to show falsity will insulate from liability some speech that is false, but unprovably so."). Once the *Moldea II* court had completed its analysis of the six examples used in the Review and found five of those examples to be true or otherwise nonactionable, it properly found that the "gist" or "sting" of the Review as a whole was accurate.

Citing *Moldea II*'s statement that one of the six observations from the Review was "close to the line," Petitioner argues that he was "entitled to a finding of non-falsity" as to

that observation, and then bootstraps a claim of pro-media bias from his alleged "entitlement" (Petition at 54-55). Putting aside the fact that Petitioner erroneously attributes the court's "close to the line" comment to the wrong example,[19] the court was unimpressed with the "sinister meeting" language as the *sole* support for a defamation lawsuit. The court termed the passage — now standing alone — a "very weak basis" for a libel action, and concluded that it was not defamatory and not actionable. *Moldea II* at 318.

There is nothing unusual about the court's substantial truth analysis. The decision reflects the neutral, workmanlike application of decades of constitutionalized libel law from *New York Times* to *Hepps*. If a libel plaintiff — like Petitioner — is unable to bear his burden of proof, whether by failure to prove falsity, inability to overcome a substantial truth defense, or lack of defamatory meaning, his case must come to an end.

CONCLUSION

Petitioner's case, which began as a sweeping attack on the Review's conclusion that *Interference* contained "too much sloppy journalism," now has been whittled down to quibbles over the interpretation of two passages in the book. In turn, the interpretation of those two passages —, and the entire fate of this lawsuit — would be reduced by Petitioner to the meaning of two words from a 692-word book review: "revives" and "sinister."

Surely our heritage demands more than an etymological scavenger hunt in these cases. After centuries of jurisprudence providing breathing space for commentary upon literary works, it cannot be that a libel suit challenging a book review turns on whether a court or a jury favors numbered definition 1, 2 or 3 from the latest edition of *Webster's Dictionary*. Lord Ellenborough's reasoning in an early libel case

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19. Petitioner states that the *Moldea II* court found the "revives the discredited notion" statement about Carroll Rosenbloom's death to be "close to the line" (Petition at 54), when the court in fact was referring to the Review's interpretation of the Namath-Michaels meeting. *See Moldea II* at 318.

involving literary criticism, implicitly adopted by the court in *Moldea II*, resonates just as clearly today as it did nearly two centuries ago:

> We really must not cramp observations upon authors and their works. They should be liable to criticism, to exposure, and even to ridicule . . . otherwise the first who writes a book on any subject will maintain a monopoly of sentiment and opinion respecting it.

Carr v. Hood, 1 Campb. 354, 357 (K.B. 1808) (reprinted in *Tabart*, 170 Eng. Rep. at 985).

For the foregoing reasons, Respondent The New York Times Company respectfully requests that this Court deny the Petition for Writ of Certiorari.

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In the Supreme Court of the United States

October Term, 1994

DAN E. MOLDEA,
Petitioner,

v.

THE NEW YORK TIMES COMPANY,
Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the District of Columbia Circuit

REPLY TO BRIEF IN OPPOSITION

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This is not a case about a "bad review," at least not in the sense that it harshly criticized Petitioner, Dan E. Moldea's ("Moldea") book, Interference: How Organized Crime Influences Professional Football ("Interference").[1] It is a case about a deliberately untruthful review which all but destroyed Moldea's professional reputation as an investigative journalist.

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[1]Interestingly, however, other sources have noted the sub-standard quality of the Review itself. See John Leonard, THE NATION, July 11, 1994, at 60-61 (where Mr. Leonard, a former editor of The New York Times Book Review wrote, "I've read Interference, and Gerald Eskenazi's Times review of it, and if we are to deplore sloppy journalism we must admit that sloppy reviewing is one of its drearier subdivisions"); Christopher Hanson, COLUMBIA JOURNALISM REVIEW, May/June 1994, at 21 ("Moldea has reason to be upset. I would, of course, never dream of suggesting that the review was sloppy. But after comparing what the book says with what the review says it says, one might conclude that Eskenazi was some distance from Pulitzer territory").

Moldea's Petition is also not limited to the two statements that were addressed by the District of Columbia Circuit Court of Appeals in Moldea v. New York Times Company, 22 F.3d 310 (D.C.Cir. 1994) ("Moldea II"). Moldea has never agreed with the Respondent, The New York Times Company's ("The Times") contention that the four-word phrase "too much sloppy journalism" is the "focal point" of the Review. See The Times' Brief In Opposition at 3 ("Oppos. at ___"). To the contrary, Moldea has always maintained that each of the statements cited in his Complaint are independently actionable, and his Petition challenges the lower courts' disposition of each of the statements on legal grounds. Petition at 12 ("Pet. at ___").

ARGUMENT

I. There Is A Circuit Conflict Concerning The Relevance Of Broader Context To The Verifiability Analysis After Milkovich v. Lorain Journal Co.

In its Opposition, The Times disputes Petitioner's claim that Moldea II is at odds with this Court's decision in Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990). See Oppos. at 11. To the contrary, The Times asserts that

> "the Moldea II court makes clear that it was firmly guided by Chief Justice Rehnquist's opinion in [Milkovich]. In decidedly unambiguous terms, the court defined its task as 'determin[ing] as a threshold matter whether a challenged statement . . . is verifiable -- that is, whether a plaintiff can prove that it is false . . . . The key to this case is the question of verifiability.'"

Id. (quoting Moldea II at 316-317.)

In Milkovich, this Court looked at only three factors in determining whether

the statements in question were actionable: 1) whether the statements were couched in "the sort of loose, figurative or hyperbolic language which would negate the impression that the writer was seriously maintaining [that Milkovich] committed the crime of perjury;" 2) whether "the general tenor of the article negate[d] this impression;" and 3) whether "the connotation that [Milkovich] committed perjury [was] sufficiently factual to be susceptible of being proved true or false." 497 U.S. at 21. Significantly, however, broader context played no part in this Court's analysis.[2]

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[2]In his Milkovich dissent, former Justice Brennan maintained that courts should continue to look at all four Ollman factors purportedly consistent with this Court's majority opinion. See 497 U.S. at 24, 32-33 (Brennan, J., dissenting). Justice Brennan's dissent has since been relied upon by federal and state courts for the proposition that broader context or (continued...)

That was decidedly not the case in Moldea II, however. Moldea II not only considered the "broader context" in which the challenged statements appeared, i.e., a book review, it determined that it was necessary to fashion an alternative verifiability test based solely upon that consideration. Moldea II at 313.[3]

The Times seeks to explain away this Court's refusal to consider broader context in Milkovich as being due to the fact that "the inescapably factual nature of a perjury charge is not the usual stuff of

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[2](...continued)
genre remains relevant after Milkovich. See, e.g., West v. Thomson Newspapers, 872 P.2d 999, 1020 (Utah 1994).

[3]Notwithstanding The Times' disingenuous assertion to the contrary, see Oppos. at 12, the resulting supportable interpretation test is most assuredly not a mere compliment to Milkovich's reasonable juror verifiability test, but will supplant it in every instance involving a book review (and presumably any analogous genre or format).

sports columns." Oppos. at 14. Leaving aside The Times' conveniently narrow view of what is and what is not the regular fare of sports columns today,[4] it strains credulity to suggest that this Court expended the time and effort necessary to craft the Milkovich opinion if it was only designed to apply when opinion writers step outside the confines of their respective forums to deliver defamatory statements on non-traditional subjects. Surely, Milkovich is not limited to its facts.

The Times' second argument, that there is no circuit conflict because courts uniformly consider context in assessing verifiability of language begs the threshold question how context should be defined. The District of Columbia Circuit

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[4]The recent events involving Tonya Harding and O.J. Simpson are merely two examples of instances where off the field issues have dominated the sports pages.

in Ollman v. Evans, 750 F.2d 970 (1984), cert. denied, 471 U.S. 1127 (1985), concluded that there are two distinct context factors. Id. at 982-984. First, there is general context which relates to the phrase, sentence, paragraph, etc. in which the challenged statements appear. Id. at 982-983. Second, there is broader context, which relates the format or genre in which the statements appear. Id. at 983-984.

The Times misleadingly lumps both context factors together in support of its argument that there is no circuit conflict. However, while general context (or tenor) continues to bear on verifiability after Milkovich,[5] the role of broader context is

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[5]Moldea has never contended that general context should be ignored. To the contrary, Moldea has always maintained that the challenged statements must be read in the context of the entire Review, and not in isolation.

unsettled because this Court did not expressly state that the factor should not be relied upon. Pet. at 30-33.

One line of cases, most notably Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724 (1st Cir.), cert. denied, 112 S.Ct. 2942 (1992), takes the view that Milkovich does not forbid the consideration of broader context, but that the factor was merely "discounted" in Milkovich. 953 F.2d at 729 n.9. Accordingly, the First Circuit in Phantom Touring considered the fact that challenged statements appeared in a theater review as part of its verifiability analysis. 953 F.2d at 729.

However, other courts, including the Ninth Circuit in Unelko Corp. v. Rooney, 912 F.2d 1049 (9th Cir. 1990), cert. denied, 499 U.S. 961 (1991), only look to the three factors considered by this Court

in Milkovich. Id. at 1053-55. Under this second approach, broader context is simply irrelevant.

The contours of the conflict appear in stark relief when one compares the District of Columbia Circuit's conflicting readings of Milkovich in Moldea v. New York Times Co., 15 F.3d 1137 (D.C.Cir. 1994) ("Moldea I") and Moldea II. Speaking on behalf of the majority in Moldea I, Judge Edwards (now Chief Judge) flatly rejected the application of the broader context factor and held that "assertions that would otherwise be actionable in defamation are not transmogrified into nonactionable statements when they appear in the context of a book review." Moldea I at 1146.

Less than three months later, however, the same esteemed judge held that "[w]hile Milkovich could be interpreted as we read it in our initial decision, we are

unwilling to assume that the Court meant to sweep away so much settled law [concerning the importance of broader context] without a clearer indication that this was indeed its intent." Moldea II at 315.

Moldea does not believe this Court's treatment of the broader context factor in Milkovich was ambiguous. However, the District of Columbia Circuit concededly does, and the divergent decisions of some of the other circuit courts suggest that it may be. Since this case presents an ideal opportunity to clarify the role, if any, broader context is to play after Milkovich, Petitioner respectfully submits that his Petition should be granted to resolve this clear conflict.

II. Moldea II's Employment Of The Supportable Interpretation Test At The Threshold Verifiability Stage Conflicts With This Court's Decisions in Milkovich and Masson v. New Yorker Magazine, Inc.

In Milkovich, this Court acknowledged the tension that exists between "the [First] Amendment's vital guarantee of free and uninhibited discussion of public issues" and "'[s]ociety['s] . . . pervasive and strong interest in preventing and redressing attacks upon reputation.'" 497 U.S. at 22 (quoting Rosenblatt v. Baer, 383 U.S. 75, 86 (1966). This Court concluded that its decision in Milkovich "[held] the balance true." 497 U.S. at 23.

The same cannot be said about Moldea II, however. Moldea II's blanket adoption of the supportable interpretation test at the threshold verifiability stage whenever book reviews are involved ensures that

reviewers can now attack authors' reputations with virtual impunity. Since the "corrective value of the 'marketplace of ideas'" provides cold comfort to all but a few of the most prominent writers,[6] see Oppos. at 8 (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)), review by this Court is imperative if the delicate balance deemed

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[6]There was no exchange of ideas in Moldea's case. Pet. at 10. When Moldea submitted his views to The Times for publication in the hope that they might "compete" with those expressed by Gerald Eskenazi in the Review, The Times refused to print them. Id. at 10-11. Moreover, interest in the book, whether measured in terms of the number of requested interviews, reviews in other publications, or books sold completely disappeared in the wake of the Review. See, e.g., Paul M. Barrett, Author Who Sued Over Scornful Review Is Now Scorned By The Publishing World, WALL STREET JOURNAL, April 7, 1994, at B3 (citing the fact that planned interviews with KCBS-TV of Los Angeles, California and Fox-TV were cancelled because of the Review).

so important by this Court in Milkovich is to be preserved.

Moldea II's adoption of the supportable interpretation test is also clearly inconsistent with this Court's decision in Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991). In Masson this Court reversed the decision of the Ninth Circuit Court of Appeals, holding that the application of the analogous rational interpretation test for purposes of determining malice was inappropriate in cases involving "fabricat[ed] . . . quotations or any analogous claim. 501 U.S. at ___, 111 S.Ct. at 2433 (emphasis supplied).[7]

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[7]Moldea previously argued in his Petition that there is no justifiable basis for concluding that non-fiction, investigative works generally and Interference in particular, are ambiguous sources. Pet. at 45-48. Despite the Times' efforts to convince this Court (continued...)

Here, Moldea's Complaint is premised upon The Times' publication of a review that deliberately and materially mischaracterized what Moldea said in Interference. As such, it is clearly an "analogous claim" and should not be analyzed under the supportable interpretation standard. Review by this Court is necessary because Moldea II improperly limits this Court's rejection of the rational interpretation standard in Masson to circumstances involving fabricated quotations. Moldea II at 316 n.3. Pet. at 41-49.

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[7](...continued)
otherwise, the relevant passages in Interference remain unambiguous. Thus, the District of Columbia Circuit's reliance on Masson was clear error.

III. The Supportable Interpretation Standard Conflicts With This Court's Decisions Because It Shifts The Burden Of Proof To The Non-Movant Libel Plaintiff At The Summary Judgment Stage

In the final section of its Opposition, the Times attempts to distort the true nature of Moldea's third question. Moldea is not primarily concerned with Moldea II's ultimate disposition of his claim on substantial truth grounds (although Moldea disagrees with the court's finding), but rather with the court's misapplication of governing summary judgment principles.

This Court has held that where a defamation "plaintiff seeks damages against a media defendant for speech of public concern . . . the plaintiff bear[s] the burden of showing falsity, as well as fault, before recovering damages." Philadelphia Newspapers, Inc. v. Hepps, 475

U.S. 767, 776, 777 (1986). Petitioner does not dispute that he bears the ultimate burden of proving falsity at trial, but asks whether media defendants are entitled to favorable treatment at the summary judgment stage. Pet. 49-60.

The Moldea II court determined that they are. Consistent with this view, the Moldea II court rejected Milkovich's reasonable juror test in favor of its own supportable interpretation standard, Moldea II at 313, a test that put Petitioner at a marked disadvantage as can readily be seen by comparing Moldea I and II's respective handling of the "revives the discredited notion" statement.

In Moldea I, the court held that the statement was actionable because "[a] jury could . . . find that the implication intended by the 'revives the discredited notion' passage was not simply that Moldea

discusses a 'discredited notion,' but that Moldea does not reveal what Eskenazi implies is the well-known truth about Rosenbloom's death." Moldea I at 1148.

In Moldea II, however, while conceding that a reasonable jury could reach the foregoing conclusion, the court nevertheless determined that the statement was nonactionable because Interference's failure to "reveal that Rosenbloom's death was accidental until 35 pages after giving undeniably titillating hints of homicide" reasonably supported the alternative interpretation that "Moldea sought to 'revive' the notion that Rosenbloom was murdered in order to build suspense before disproving that theory." Moldea II at 318.[8]

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[8]Moldea II's determination, as a matter of law, that its alternative interpretation of the "revives the discredited notion" (continued...)

The supportable interpretation standard dramatically favors media defendants because it shifts the burden at the summary judgment stage from the media defendant to the non-movant, plaintiff. If this new test is allowed to stand, libel plaintiffs will no longer be able to survive summary judgment by showing that a reasonable jury could find that the challenged statements are false whenever media defendants arguably engage in an interpretive exercise. Instead, they will be forced to establish as a matter of law that no reasonable person could find that

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[8](...continued)
statement was supportable also ran afoul of well-settled summary judgment principles. If the court had adhered to this Court's decision in Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and refrained from weighing the evidence and gave Petitioner the benefit of all reasonable inferences, it would have been required to leave the issue of whether its alternative interpretation was supportable for the jury. Id. at 255.

the challenged statements are supportable interpretations of the book, or other underlying subject matter of the speaker's commentary.[9] Moldea II at 317.

This approach flies in the face of the idea that Rule 56 motions must be decided with procedural neutrality in cases involving media defendants, a policy favored by this Court in Anderson v. Liberty Lobby, Milkovich and Masson, as well as by a number of the federal circuit courts. See Pet. at 52 (and cases cited therein). Petitioner respectfully submits that this Court's review of Moldea II is necessary to ensure that other courts do not follow the District of Columbia

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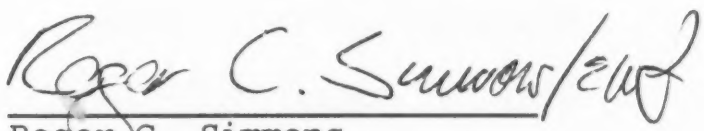
[9]This means that media defendants will be entitled to judgment as a matter of law if they can offer (or the court can itself divine) a reasonably supportable interpretation of the statement at issue.

Circuit's lead in favoring media defendants at the summary judgment stage.

CONCLUSION

For the reasons set forth above, as well as those stated in his May 3, 1994 Petition, Moldea respectfully prays that a writ of certiorari issue.

Respectfully submitted,



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